Office-Supreme Court, U.S.
FILED
APR 18 1981
ALEXANDER L. STEVAS,
CLERK

80-1751

NO. _____

IN THE

Supreme Court of the United States

October Term, 1980

WALTER ZANT, WARDEN,
Petitioner,

v.

JACK HOWARD POTTS,
Respondent.

On Appeal From the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

Where a habeas corpus petitioner, who is under death sentence, makes an intentional, knowing and unequivocal abandoment of his federal habeas corpus rights, is his subsequent successive petition raising identical issues an abuse of the writ of habeas corpus?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

OPINIONS BELOW. 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS. 3

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE WRIT

WHERE A HABEAS CORPUS PETITIONER, WHO IS UNDER DEATH SENTENCE, MAKES AN INTENTIONAL, KNOWING AND UNEQUIVOCAL ABANDONMENT OF HIS FEDERAL HABEAS CORPUS RIGHTS, HIS SUBSEQUENT SUCCESSIVE PETITION RAISING IDENTICAL ISSUES IS AN ABUSE OF THE WRIT OF HABEAS CORPUS 14

CONCLUSION. 19

CERTIFICATE OF SERVICE. 20

TABLE OF AUTHORITIES

	Page
Bryan v. United States, 492 F.2d 775 (1974), cert. denied, 419 U.S. 1079 (1974).	17
Fay v. Noia, 372 U.S. 391 (1963). .	14,15
Haley v. Estelle, 632 F.2d 1273 (5th Cir. 1980)	15
Johnson v. Zerbst, 304 U.S. 458, 464 (1938).	14
Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980)	15
Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980), cert. denied, ___ U.S. ___ (1980)	15
Potts v. Austin, No. C80-964A (N.D. Ga. June 13, 1980). . . .	2
Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978)	4
Potts v. Zant, 638 F.2d 727 (5th Cir. 1981).	1,2,13
Potts v. Zant, No. C80-1078A (N.D. Ga. June 26, 1980). . . .	2
Sanders v. United States, 373 U.S. 1 (1963).	15
Wong Doo v. United States, 265 U.S. 239 (1924).	15,16

Constitutional Amendment Cited:

	Page
Fourteenth Amendment, United States Constitution.	3

Statutes Cited:

28 U.S.C. § 2254(a)	3

Rules Cited:

F.R.Crim.P. 11.	6
Rule 9, 28 U.S.C. § 2254.	3

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WALTER ZANT, WARDEN,

Petitioner,

v.

JACK HOWARD POTTS,

Respondent.

On Appeal From the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. See Potts v. Zant, 638 F.2d 727 (5th Cir. 1981) (Appendix 1). The opinion of the District Court dismissing Respondent Jack Howard Potts' first habeas

corpus petition is an unreported decision. See Potts v. Austin, No. C80-964A (N.D. Ga. June 13, 1980) (Appendix 60). The opinion of the District Court dismissing Potts' second habeas corpus petition is also an unreported decision. See Potts v. Zant, No. C80-1078A (N.D. Ga. June 26, 1980) (Appendix 75).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered February 17, 1981. See Potts v. Zant, 638 F.2d 727 (5th Cir. 1981) (Appendix 1). A timely petition for rehearing en banc was denied on March 23, 1981, and this petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

28 U.S.C. § 2254(a):

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

Rule 9(b) of 28 U.S.C. § 2254:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different

grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged,the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

STATEMENT OF THE CASE

Respondent Jack Howard Potts' convictions and death penalties were affirmed by the Georgia Supreme Court on direct appeal. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978). He then filed for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, which denied relief. His attorneys filed a notice of appeal; but while his appeal was pending, Potts wrote the Georgia Supreme Court in November, 1979, firing his attorneys and

requesting his appeal be dismissed. The Georgia Supreme Court denied a certificate of probable cause to appeal, but allowed Potts' motion to discharge his attorneys. After the Georgia State Board of Pardons and Paroles refused to commute Potts' death penalties to life imprisonment, Potts' execution was set for June 5, 1980.

On the evening of June 4, 1980, Potts filed for federal habeas relief and the District Court stayed the execution set for June 5.

However, after the District Court stayed the June 5, 1980, execution, Potts immediately wrote the District Court that he be allowed to withdraw his appeal, fire his attorneys, and be executed as soon as possible. (Appendix 91-93).

Neither the District Court nor the attorneys for Potts or Warden Zant were aware of an appropriate procedure for handling this issue, so prior to the hearing the District Court proposed in chambers that Potts would be examined in open court in a manner analogous to the acceptance of a guilty plea under F.R.Crim.P. 11. (Appendix 89).

Potts was brought to the District Court and carefully and thoroughly examined by the Court. Potts was informed of his right to counsel, and he refused to have an attorney represent him. (Appendix 88-89, 106). Potts was placed under oath. (Appendix 90). He testified that he understood the nature of the proceedings and admitted he wrote the letter received by the Court June 6, 1980. (Appendix 91-93).

Potts said he understood the consequences of his action, and then the Court advised him of his Fifth Amendment right against self-incrimination. (Appendix 93-94). Nevertheless, Potts admitted in open court that he had been found guilty of a murder he had in fact committed. (Appendix 94).

No one had threatened or coerced Potts into abandoning his federal habeas corpus remedies. (Appendix 95). His decision to abandon his federal habeas remedies was for the grounds stated in the letter, i.e. so that he could die in a state of grace. (Appendix 92, 95). Then the following dialogue ensued:

The Court:

> "Do you understand that if the Court grants your request and dismisses these appeals, that under Georgia

law that you would immediately be resentenced and within ten to twenty days of that date, that sentence of the Court would be carried out?"

Potts:

"This is my wish."

The Court:

"You understand that is what - -"

Potts:

"Yes, sir, I understand it perfectly clear." (Appendix 96).

Potts was knowledgeable about the legal history of his case. (Appendix 96-103). He had written the Georgia Supreme Court in November and December, 1979, and in January, 1980, asking that his appeal be dismissed. (Appendix 102-03).

He knew what was in his federal habeas corpus petition. (Appendix 103, 105). Then occurred the following exchange:

The Court:

> "The action you are requesting, do you realize would be an abandonment [Emphasis added] of certain constitutional, claims of certain constitutional violations? Do you understand that?"

Potts:

> "Yes, sir."

The Court:

> ". . . Do you understand that if you dismiss or abandon this, you have abandoned your last available attack upon your conviction and sentence [Emphasis added]?"

Potts:

"I'm well aware of that."

The Court:

". . . Do you have any question of the Court concerning this matter or the effect of your withdrawal or abandonment [Emphasis added] of this action?"

Potts:

"No."

The Court:

". . . You realize if I dismiss those, then you have nothing from which to appeal to the Court of Appeals for the Fifth Circuit or to the United States Supreme Court?"

Potts:

"Yes, sir."

The Court:

"Do you realize the consequences of that would be that you would be remanded to the State prison for resentencing by the two superior courts involved?"

Potts:

"Yes, sir." (Appendix 104-06).

Prior to the hearing, the District Court had requested Psychiatrist William Davis to observe the hearing and then determine as to whether or not Dr. Davis could testify Potts was competent and understood the consequences of his request. (Appendix 108,111-12). Dr. Davis testified unequivocably that Potts understood what he had requested, the

nature of the request, and the consequences of the request. (Appendix 112).

After Dr. Davis testified, the District Court asked Potts if events or treatment at Georgia State Prison, Reidsville, Georgia, had caused Potts to abandon his habeas corpus petitions. (Appendix 114). Potts replied that his reasons were as stated in his letter to the Court. (Appendix 114).

The District Court orally dissolved the stay (Appendix 115),dismissed the habeas petition, and entered judgment for the Warden. (Appendix 60).

Potts' new execution date was set for July 1, 1980. On June 25, 1980, Potts filed a second federal habeas corpus petition raising the identical issues presented in his first petition. A hearing was held before the District Court on June 20, 1980.

It was undisputed at that hearing that Potts was not alleging he was incompetent when he abandoned his federal habeas corpus rights. After the hearing argument of counsel, the District Court dismissed Potts' second petition as an abuse of the writ.

The Fifth Circuit Court of Appeals granted a stay of execution and on February 17, 1981, vacated the District Court order and remanded the case to the District Court for an evidentiary hearing on whether Potts' abandonment of his federal habeas corpus rights was voluntary. Potts v. Zant, 638 F.2d 727 (5th Cir. 1981). (Appendix 1). There were a concurring and a dissenting opinion. Warden Zant's timely petition for rehearing en banc was denied March 23, 1981. (Appendix 84-85).

REASON FOR GRANTING THE WRIT

WHERE A HABEAS CORPUS PETITIONER WHO IS UNDER DEATH SENTENCE, MAKES AN INTENTIONAL, KNOWING AND UNEQUIVOCAL ABANDONMENT OF HIS FEDERAL HABEAS CORPUS RIGHTS, HIS SUBSEQUENT SUCCESSIVE PETITION RAISING IDENTICAL ISSUES IS AN ABUSE OF THE WRIT OF HABEAS CORPUS.

This case presents an important question of federal law which has not been, but should be, settled by this Court.

By deliberately by-passing State remedies, a habeas petitioner may be denied federal habeas relief. See Fay v. Noia, 372 U.S. 391, 438-39 (1963). The standard to be applied is the definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) -- "An intentional relin-

quishment or abandonment of a known right or privilege." Fay v. Noia, supra at 438-39.

Just as a habeas petitioner may abandon his State remedies, he may abandon his claim to federal relief. See Sanders v. United States, 373 U.S. 1, 18 (1963); Wong Doo v. United States, 265 U.S. 239 (1924). If a second habeas corpus petition raises new issues not presented in the first petition, then to have abuse of the writ it must be shown that there was inexcusable neglect or that the petitioner deliberately withheld a claim from the first petition. Haley v. Estelle, 632 F.2d 1273 (5th Cir. 1980); Mays v. Balkcom, 631 F.2d 48, 51 (5th Cir. 1980); Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980).

However, where a successive petition raises identical issues to a previous petition that was knowingly and voluntarily abandoned, the successive petition constitutes an abuse of the writ. See Wong Doo v. United States, 265 U.S. 239 (1924).

The purpose of the hearing of June 10, 1980, before the District Court was to determine whether or not Potts' abandonment of his federal habeas corpus rights was knowing and voluntary. Potts stated that he was not being coerced into abandoning his federal habeas corpus rights. He was rational and understood the consequences of his acts and the nature of the proceedings, and he testified it was his wish to abandon his federal habeas corpus rights. Dr. Davis testified Potts understood what he was doing and the consequences of his action. Potts' own attorneys later conceded Petitioner was competent.

The evidence produced to the District Court on June 10, 1980 established beyond any doubt that Potts made a knowing and voluntary abandonment of his federal habeas corpus rights. Petitioner should be bound by the representations he made to the District Court. Cf. Bryan v. United States, 492 F.2d 775 (1974), cert. denied, 419 U.S. 1079 (1974). Potts' filing a second petition raising identical issues to the petition he previously abandoned constituted an abuse of the writ.

Petitioner has been convicted in the courts of Georgia of capital crimes and the death penalty was imposed. His convictions and sentences were affirmed on direct appeal, and he had a habeas corpus hearing in the Superior Court of Tattnall County, Georgia. Petitioner knowingly and voluntarily abandoned his federal habeas corpus rights.

There should be a finality to post-conviction litigation, even post-conviction litigation on behalf of inmates under death sentence. The remanding to the District Court for another hearing on voluntariness is to allow Potts to frustrate the legal processes.

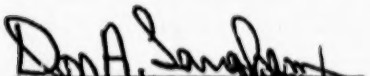
CONCLUSION

For all of the previously stated reasons, a petition for writ of certiorari should be granted by this Court.

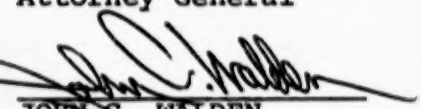
Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

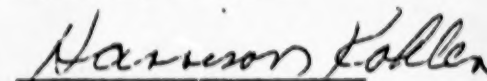
ROBERT S. STUBBS, II
Executive Assistant
Attorney General



DON A. LANGHAM
First Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General



HARRISON KOHLER
Assistant Attorney
General
Counsel of Record

Please serve:

HARRISON KOHLER
132 State Judicial
Building
40 Capitol Square,
S.W.
Atlanta, Georgia
30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of this Petition for Writ of Certiorari upon the Respondent by depositing this petition in the United States mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

Mr. Millard C. Farmer
Mr. Joseph M. Nursey
Ms. Andrea I. Young
Attorneys at Law
15 Peachtree Street
Suite 831
Atlanta, Georgia 30303

Mr. Frank Derrickson
Mr. Thomas M. West
Attorneys at Law
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

(Cont.)

CERTIFICATE OF SERVICE (Cont.)

Mr. Ralph Goldberg
Attorney at Law
823 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

This 16th day of April, 1981.

Harrison Kohler

HARRISON KOHLER
Assistant Attorney
General
Counsel of Record

80-1751

NO.

Office-Supreme Court, U.S.
FILED
APR 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ZANT, WARDEN,
Petitioner,

v.

JACK HOWARD POTTS,
Respondent.

APPENDIX

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

TABLE OF CONTENTS

	Page
OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	1
OPINION OF UNITED STATES DISTRICT COURT DISMISSING RESPONDENT'S INITIAL HABEAS CORPUS PETITION	60
OPINION OF DISTRICT COURT DISMISSING RESPONDENT'S SECOND HABEAS CORPUS PETITION	75
ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC	84
TRANSCRIPT OF RESPONDENT'S INITIAL HEARING BEFORE THE DISTRICT COURT	86

Jack Howard POTTS,
Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellee.

Jack Howard POTTS,
Petitioner-Appellant,

v.

Sam AUSTIN, Respondent-Appellee.
Nos. 80-7476, 80-7477, 80-7664 and 80-7665.

United States Court of Appeals, Fifth Circuit.
Unit B

Feb. 17, 1981.

Petitioner appealed from an order of the United States District Court for the Northern District of Georgia, William C. O'Kelley, J., 492 F.Supp. 326, as well as another order by that same court which dismissed his first and second sets of federal habeas petitions respectively. The Court of Appeals, R. Lanier Anderson, Circuit Judge, held that: (1) knowing and intelligent waiver of petitioner's federal habeas corpus rights did not render a subsequent identical petition an abuse of the writ, without regard to any justifiable reasons petitioner may have had for his initial waiver or subsequent petition, and (2) district court erred in denying petitioner, whose request for withdrawal of his first habeas petition was granted, an evidentiary hearing after he filed second identical petition so as to afford petitioner an opportunity to rebut and explain any allegation of abuse and to determine whether

his initial abandonment of first petition was knowing and voluntary.

Affirmed in part and vacated and remanded in part.

Lewis R. Morgan, Circuit Judge, filed a dissenting opinion.

Thomas A. Clark, Circuit Judge, filed specially concurring opinion.

1. Habeas Corpus 120

Denial of an application for habeas corpus is not res judicata with respect to subsequent application. 28 U.S.C.A. § 2254.

2. Habeas Corpus 7

Doctrine of abuse of the writ is applicable to successive applications for federal habeas relief presenting different grounds from those presented in a prior application and with successive applications containing same ground earlier presented but not adjudicated on the merits. 28 U.S.C.A. § 2254.

3. Habeas Corpus 87

Rule authorizing voluntary dismissal was not applicable to petitioner's dismissal of his first habeas petition so as to give him a right to dismiss first petition without any procedural prejudice attaching to his claims. Rules Governing Section 2254 Cases, Rule 11, 28 U.S.C.A. foll. § 2254; Fed.Rules Civ.Proc. Rule 41(a), 28 U.S.C.A.

4. Habeas Corpus 7

Knowing and intelligent waiver of petitioner's federal habeas corpus rights did not render a subsequent identical petition abuse of the writ, without regard to any justi-

fiable reasons petitioner may have had for his initial waiver or subsequent petition. 28 U.S.C.A. § 2254.

5. Habeas Corpus 7

District court erred in denying petitioner, whose request for withdrawal of his first habeas petition was granted, an evidentiary hearing after he filed second identical petition so as to afford petitioner an opportunity to rebut and explain any allegation of abuse and to determine whether his abandonment of first petition was knowing and voluntary. 28 U.S.C.A. § 2254.

6. Habeas Corpus 7

Federal habeas petitioner must be given an opportunity to rebut and explain any allegation of abuse. 28 U.S.C.A. § 2254.

7. Criminal Law 997.16(5)

Where a petitioner attacking a guilty plea sets out detailed factual allegations regarding alleged circumstances which go to voluntariness of his plea, petitioner is entitled to a hearing unless motion and files on record conclusively show petitioner is entitled to no relief. 28 U.S.C.A. § 2255.

8. Habeas Corpus 7

Even if successive federal habeas petition could otherwise be dismissed without consideration on the merits, ends of justice may nevertheless induce and may even require district judge to exercise his discretion to address the merits. 28 U.S.C.A. § 2254.

Appeals from the United States District Court for the Northern District of Georgia.

Before MORGAN, ANDERSON and THOMAS A. CLARK, Circuit Judges.

R. LANIER ANDERSON, Circuit Judge:

Appellant Jack Howard Potts was sentenced to be executed pursuant to two convictions: one for kidnapping with bodily injury and the other for first degree murder. He brings this appeal of four consolidated petitions for habeas corpus, claiming he has been improperly denied federal review on the merits of his claims. The unusual factual circumstances surrounding Potts' filing of these petitions requires this panel to examine important questions concerning abuse of the writ of habeas corpus. Because we find that the district court should have granted a hearing on the issue of abuse, and because we find that in cases numbered 80-7476 and 80-7477 the district court applied an improper standard, we vacate the decisions in those cases and remand for further hearings. With respect to cases numbered 80-7664 and 80-7665, we affirm the district court's order dismissing, at Potts' request, the petitions filed in those cases.

FACTS

Because of the difficult question we must address here concerning abuse of the writ, a full statement of the unusual procedural history in these cases is necessary.

Potts' federal habeas petitions attack both convictions and sentences. Both convictions arose out of a single incident in which Potts allegedly kidnapped Michael D. Priest in Cobb County, Georgia, drove Priest to Forsyth

County, Georgia, where Potts allegedly shot and killed Priest.

On March 11, 1976, Potts was convicted of kidnapping with bodily injury and armed robbery in the Superior Court of Cobb County, Georgia, and death sentences were imposed for each of those offenses. Four months later, on July 14, 1976, Potts was convicted for the murder of Priest in the Superior Court of Forsyth County, Georgia, and was sentenced to death pursuant to this conviction.

The two cases were consolidated for direct appeal to the Supreme Court of Georgia. On March 16, 1978, that court affirmed Potts' convictions and sentences with respect to the charge of kidnapping with bodily injury and murder, and reversed the sentence of death for armed robbery. *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978).

Potts, in his brief to this court, alleges that after losing his direct appeal to the Supreme Court of Georgia, he desired to file a petition for writ of certiorari in the United States Supreme Court, but that his attorneys failed to do so.

On November 14, 1978, Potts filed a state habeas corpus petition in the Superior Court of Tattnall County, Georgia, for both of his convictions and death sentences. After consolidated evidentiary hearings on January 22 and April 27, 1979, the superior court entered an order on July 24, 1979, denying Potts all relief. On August 9, 1979, Potts applied for a certificate of probable cause to appeal this denial of state habeas to the Supreme Court of Georgia.

Before any action was taken on his appeal of the denial of state habeas, Potts discharged his attorneys and requested them to withdraw the application pending in the

Supreme Court of Georgia. Potts has testified in a hearing on June 10, 1980, related to his first federal habeas petitions, that shortly before asking that his application be withdrawn, his attorneys told him that was no hope of success, but they could only prolong his case and hope that the death penalty would be abolished before completion of his appeals[1] (Tr., June 10, 1980, hearing, p. 20). Counsel communicated Potts' request to withdraw his application to the Supreme Court of Georgia. Potts himself wrote three letters to the Supreme Court of Georgia in November and December, 1979, and in January, 1980, reiterating his request that his applications be withdrawn. On January 8, 1980, the Supreme Court of Georgia denied Potts' motion to withdraw his appeal, denied his application for certificate of probable cause for habeas corpus appeal, and granted the motion to discharge Potts' attorneys.[2]

An execution date was then set in both cases for February 15, 1980. On February 13, 1980, Governor George Busbee, acting upon a request from the Pardon and Parole Board, granted a 90-day stay pending clemency consideration. Potts did not initiate or seek this review by the Pardon and Parole Board. In his brief to this court, Potts alleges without contradiction from the state

---

[1] We mention this fact for what light it may shed on Potts' subsequent actions with respect to his pursuit of collateral relief. Potts also testified, inconsistently, that his decision to withdraw his application for a certificate of probable cause was made before being told of the supposed hopelessness of his case by his attorneys. (Tr., June 10, 1980, hearing, p. 20).

[2] There is no claim by the state that Potts has failed to exhaust state remedies with respect to the issues raised in his habeas petitions now on appeal. Nor is there any claim that Potts has attempted to deliberately by-pass any state review procedure, either on direct appeal or on collateral attack.

that he declined to cooperate with attorneys seeking to pursue clemency with the Pardon and Parole Board on his behalf. After a proceeding on April 24, 1980, at which Potts was unrepresented, clemency was denied on May 1, 1980. An execution date was then reset in both cases for June 5, 1980.

On June 3, 1980, the Reverend Murphy Davis and other individuals, in an attempt to stay Potts' imminent execution, filed two "next friend" habeas corpus petitions in both cases in the United States District Court for the Northern District of Georgia. Potts in no way participated or consented to the filing of these petitions. After a hearing on June 4, 1980, in which testimony by a psychologist was taken, documentary evidence was viewed, and a video tape of a press conference held by Potts on June 2, 1980, was viewed, the district judge dismissed the action, finding that the petitioners were not proper next friends and that Potts was competent.[3] At approximately 6:50 P.M. on June 4, this court entered an order denying the next friends' applications for a stay of execution pending appeal. *Davis v. Austin*, Nos. 80-7418 and 80-7419 (5th Cir. June 4, 1980).

At approximately 7:15 P.M. on that same day, June 4, the judge received notice by telephone that Potts had signed an authorization for Messrs. Millard Farmer, Andrea Young, and Joe Nursey to act as his attorneys and to file for the first time with his authorization two § 2254 petitions attacking his two convictions and sentences.[4] When this telephonic notice was received, Potts'

[3] Judge O'Kelley entered this order sometime in the afternoon of June 4, 1980, although the record is unclear as to exactly when.

[4] These two petitions are numbers 80-7664 and 80-7665 on appeal to this court.

scheduled execution was less than 15 hours away. The judge immediately granted stays of the execution. The state did not contest these stays.

Potts' intention to pursue federal habeas was apparently short-lived. Late in the afternoon on June 6, 1980, the district court received a letter written earlier that day by Potts, in the presence of his mother, in which he asked that his habeas petitions by withdrawn.[5] The letter, not

---

[5] The letter, with Potts' grammatical errors, reads as follows:

Dear Judge O Kelly

Sir i wrote a note to you requesting to appeal and you granted a stay. at the time i asked for the new appeals i was with my brother, the only reason i asked for the appeal was to satisfy my brother who i love very much. Judge, i had no idea the stay would be granted, i knew you had refused a last final appeal, so i truly thought that by writing the note in my brothers presence the only thing it would accomplish would be to set his mind at ease so he (my brother) could know without a doubt he had done all he could do for me. Judge O Kelly i am asking you to let me (if its my right) withdraw the appeal. I realize Millard Farmer will only continue to use me and my situation if you fail to help me now. I beg of you to please let me withdraw the appeal as quickly a possible! Let me get a date set immediately and most of all let me die while in a state of grace! And could you issue an order that i refuse to see any reporters or news people. Judge O Kelly i am giving this letter to my mother who will forward it to you today 6/6/80. I assure you Judge i am sound of mind and body, but i must be able to withdraw the appeal and i do now, as of today refuse the help of Millard Farmer and Andrea Young. and i refuse to speak with them. God Bless you Judge for your kind and considerate cooperation.

/s/ Jack H. Potts
69124—4th Floor
Reidsville, GA.
6/6/80

June 6, 1980
Witnessed:
/s/ Mrs. Carolyn Potts (Mother) June 6, 1980.

Attached to the letter was a third page, reading as follows:

(1) No reporters to be let in to Reidsville [the prison in which

surprisingly, is emotional, yet articulately phrased. In it, Potts stated that the only reason he authorized the filing of the § 2254 petitions was to set his brother's mind at ease so that his brother could believe that he had done all he could for Potts. Potts further stated that at the time he authorized the filing of his § 2254 petitions, he did not believe that a stay would be granted since he knew of the court's prior refusal of a "last final appeal." [6] Potts requested that his petition be withdrawn as quickly as possible so that he could die while "in a state of grace." Potts further requested that he be allowed to dismiss his attorneys and that the court order that he be permitted to refuse to see reporters or news people. Potts assured the court that he was of sound mind and body. At the end of the letter on a third page were five items, some of which were requests. Potts specifically asked that an immediate date for execution be set.

During the weekend after June 6, Potts' attorneys attempted to convince Potts to continue with his habeas corpus action and their representation of him. Because the district court refused to dismiss Potts' petition on the

---

Potts was incarcerated] to see me.

(2) No moving me back and forth from Reidsville Prison to Jackson Prison.

(3) An immediate date to be set so the circus atmosphere will not have the chance to begin.

(4) Please accept my apology for having caused you problems in this, Judge.

(5) Every thing is prepared here at Reidsville for an execution if an immediate date is set.

/s/ Jack H. Potts
6/6/80

[6] The letter does not state which appeal this was, but presumably Potts is referring to the "next friend" petition rejected by the district court on June 4, as this is the only federal petition filed with respect to Potts' case before he authorized the first set of petitions.

basis of the letter transmitted by Potts' mother, the district court met on June 9 with Potts' attorneys and representatives of the Georgia Attorney General's office to establish a procedure to determine whether or not Potts' petitions would be withdrawn. The district court proposed that Potts be brought to the court in order that the court could address him personally and suggested that the court follow a procedure analogous to acceptance of a plea of guilty under Rule 11 of the Federal Rules of Criminal Procedure. All counsel concurred in the court's proposed approach. The court further proposed that a court-appointed psychiatrist be present at the hearing for the purpose of rendering his opinion as to Potts' competency at the time of the hearing. Counsel also agreed with this procedure. Because Potts had expressed in his letter to the court that he would thereafter refuse the help of his counsel and desired not to talk with them further, Potts' attorneys agreed that they should not act as counsel at the hearing but that the court should conduct the proceedings.

On June 10, 1980, a hearing was held with Potts present and his attorneys also in the courtroom. The district court commenced the hearing by advising Potts that his attorneys of record had not been relieved by the court and that he had a right to be represented at the hearing by counsel of record or another attorney. Potts indicated that he did not desire his attorneys of record or any other attorney to represent him. Potts then took the witness stand and was sworn in. Potts was warned by the court that he had a right to refuse to answer any question that would be incriminating. The court thereupon proceeded to question Potts concerning his request to withdraw his habeas corpus petitions. After establishing that Potts had

written the letter the court received on June 6, the court asked Potts why he wished to withdrawn his petitions. Potts replied,

> I was tried by a jury of twelve men and women. I have been found guilty of murder, a murder I committed. I could argue the Constitutional laws that may have been overlooked or misused or whatever but I see no sense in going on further and further, year after year, and probably end up dying in the electric chair anyway.
>
> I did not want to change my mind this past Thursday but, as a I said in the letter, it's, it would have been very hard on my brother to see me die and thinking he could have done something else for me so now that he can leave it that, you know, he did what he could do and now he will be satisfied. I hope he can live with that.

(Tr., June 10, 1980, hearing, pp. 10-11).

The court thereupon questioned Potts as to whether he had been threatened or coerced to withdraw his petitions.

> Q Has anyone in any way threatened you to get you to withdraw—
>
> A Definitely not.
>
> Q —this appeal?
>
> A No, sir, Judge.
>
> Q Has anyone tried to coerce you into changing your mind?
>
> A No one has said anything about would you do it or would you not do this. I have had people ask me would you not do it but no one has coerced me into doing this. I made this decision on my own.
>
> Q Has anyone at all tried to get you to in any way withdraw your habeas corpus actions?
>
> A No, no one has done that. This is my decision.

Q Has any force been used against you to get you to change or in any way make your life such that it would be more miserable for you if you didn't change your mind?

A Your Honor, when I asked, requested for this appeal, I knew that I, there would be some things that I would go through that any man would in prison because of just human feelings. Some people wanted me dead. Some wanted me alive but I made this decision and I'm asking the Court—and I did not do anything to make a mockery of the judicial system. I did it on the grounds like I told you in the letter. That's the only reason I did it. That's the only reason I asked for the appeal.

(Tr., June 10, 1980, hearing, pp. 12-13).

The court then questioned Potts as to the appeals he had previously brought with respect to his convictions and sentences. Potts was knowledgeable of the course of his case through the state courts.[7] He testified that he had read the § 2254 petitions filed in federal court, but was somewhat confused as to whether they raised the same claims presented in the state courts.

The court then questioned Potts to ascertain whether he understood the significance of dismissing his federal habeas petitions.

Q The action you are requesting, do not realize would be an abandonment of certain Constitutional, claims

---

[7] Potts expressed his belief that a petition for writ of certiorari had been filed with the United States Supreme Court on his direct appeal. Lawyers present at the hearing informed the district court this was not true. When the district court informed Potts of a possible error in his memory of the course of his direct appeal, Potts stated it did not matter to him whether or not certiorari had been carried to the U. S. Supreme Court. (Tr., June 10, 1980, hearing, pp. 36-37).

of certain Constitutional violations? Do you understand that?

A Yes, sir.

Q And do you understand that, as I mentioned earlier, there is the direct appeal, there is the opportunity to make a State habeas corpus, a State habeas corpus attack, collateral attack upon a conviction and once that has been exhausted, one may then through the Federal courts file habeas corpus, making claims of Constitutional violations that have already been made before the State court and you can only make them in Federal court if you have exhausted State court remedies? Do you understand that?

A Yes.

Q Now, it appears that you previously have taken your direct appeal through the Georgia Supreme Court to the U. S. Supreme Court and that you had your State habeas corpus to the Tattnall Superior Court and to the Georgia Supreme Court.

A (Nods head affirmatively.)

Q And that the third and last of those forms of attack you now are in; that is, in the United States District Court claiming certain Constitutional violations. Do you understand that?

A Yes.

Q Do you understand that if you dismiss or abandon this, you have abandoned your last available attack upon your conviction and sentence?

A I'm well aware of that.

Q Do you have any question of the Court concerning this matter or the effect of your withdrawal or abandonment of this action?

A No.

. . . . .

Q And you want both these habeas corpus cases dismissed?

A Yes, sir.

Q You realize if I dismiss those, then you have nothing from which to appeal to the Court of Appeals for the Fifth Circuit or to the United States Supreme Court?

A Yes, sir.

Q Do you realize the consequences of that would be that you would be remanded to the State prison for resentencing by the two superior courts involved?

A Yes, air.

(Tr., June 10, 1980, hearing, pp. 22-25).

The court thereupon gave the attorneys for the state and Potts' attorneys an opportunity to say anything or to request the court to ask any question of Potts. At that time they made no requests for additional questions to be posed to Potts.

After Potts had finished testifying, the court placed on the stand a psychiatrist, Dr. Davis, who had been in the courtroom observing Potts during the hearing. Dr. Davis testified he had no previous contact with Potts but that, based on his observation during the hearing, Potts understood the nature of his request and the consequences of it. Dr. Davis stated he could observe nothing which would would cause the court concern about Potts' competence.

A short recess was taken after the testimony of Dr. Davis, at which time Potts' attorneys requested the court to question Potts concerning destruction of certain personal effects in prison about which they had heard. When the hearing reconvened, the court questioned Potts concerning this matter.

Q Mr. Potts, I am not going to call you back to the stand but I do want to make sure I understand one other thing that has been suggested by the attorneys and while I do not have full knowledge of everything that has been reported by the media, apparently there has been reports in the media of some destruction of religious objects of your and some other treatment of you at Reidsville and that this had a bearing upon and was the reason you wrote the letter you wrote and are changing your mind. Is that correct, sir?

A The reason I changed my mind, Your Honor, was the reason I told you in that letter.

Whatever else happened, which some things did happen and I wish that you could help make sure they don't happen anymore these last few days but that's not the reason I changed my mind. My letter is the reason I changed my mind, I told you in the letter.

Q Have you told Ms. Nicholson or other persons that the reason you were doing this was because of acts taken against you by the guards or prison officials?

A No, I did not say that's the reason.

(Tr., June 10, 1980, hearing, pp. 35-36).[8]

On June 13, 1980, the district court entered an order dismissing Potts' petitions. When this order was entered, the state had not filed any responsive pleadings and the order in no way addressed the merits of Potts' claims. The court found that Potts was fully competent to make the decision to abandon further legal proceedings and further found that his requests were clear and were not the prod-

---

[8] This panel commends Judge O'Kelley's decision to use a procedure analogous to Fed.R.Crim.P. 11 for accepting a guilty plea to determine whether Potts genuinely desired to withdraw his habeas petitions. His action reflects a compassionate, humane concern to ascertain Potts' true intentions with respect to his first habeas petitions. His questioning of Potts was thorough.

uct of mental incompetency or coercion. The court directed that Potts' attorneys be stricken as counsel of record and dissolved the stay of execution. With the stay dissolved, Potts' execution was rescheduled for July 1, 1980.

On June 25, 1980, the district court received a telephone call from Mr. Joe Nursey, who was counsel of record in the previously dismissed petitions, indicating that Potts had authorized the filing of a second set of petitions for writs of habeas corpus. Since only a few days remained before the scheduled execution, the court requested that Mr. Nursey deliver the pleadings to Gainesville, Georgia, where the court was holding a civil trial. Upon arriving, Mr. Nursey indicated that he had unintentionally misled the court and that he was not authorized to file the actions until the following morning so that Potts could contact a family member prior to that time. After the court indicated to Mr. Nursey that trifling with the court would not be countenanced, Mr. Nursey proceeded to file the actions at that time. The two petitions filed on June 25 are essentially identical to the first two petitions.[9] The petitions filed on June 25 contain additional material relating to the events surrounding the filing of his first set of habeas petitions and his quick withdrawal of those petitions. The June 25 petitions alleged that the reason Potts withdrew his prior petitions was depression he suffered resulting from "exceptional harassment by prison officers," discontent of family members at the prospect of his continued incarceration,[9a] and the "circus atmosphere"

[9] The petitions filed on June 25 are numbers 80-7476 and 80-7477 on appeal to this court.

[9a] In his brief to this court, Potts alleges that his mother was displeased with his decision to appeal and told him he had done the wrong thing by not going through with the execution.

surrounding his case. The substantive issues raised in the second set of petitions are verbatim identical with those raised in the first set of petitions. Potts raises several serious allegations of constitutional impropriety with respect to both his convictions and sentence.[10]

With the filing of the second set of petitions, the court scheduled a hearing for the next day, June 26, to determine whether the subsequent petitions should be entertained and a stay granted. Because of confusion as to whether Potts had authorized this second set of petitions, the court and counsel for both sides called the warden of the Georgia Diagnostic and Classification Center where Potts was being held to determine if Potts has authorized the filing of the petitions. The warden, after talking with Potts, indicated to the court and counsel that Potts had

---

[10] With respect to his conviction in Cobb County for kidnapping with bodily injury, armed robbery, and aggravated assault, Potts claims (i) faulty jury instructions, contributing to conviction of a capital crime and constituting deprivation of due process, (ii) state's knowing refusal to correct witness's testimony which would otherwise impeach the witness, (iii) improper admission of hearsay evidence of prior crimes, (iv) improper closing argument, (v) failure to change venue for prejudicial pretrial publicity, (vi) cruel and unusual punishment in imposing death penalty for kidnapping, (vii) improper removal of veniremen with scruples concerning capital punishment, (viii) denial of due process by failure to state aggravating circumstances within indictment, (ix) arbitrary and capricious application of Georgia's death penalty, (x) no theoretical justification for death penalty, (xi) excessiveness of sentence considering all circumstances surrounding crime, (xii) inadequacy of appellate review in Georgia of capital cases, and (xiii) cruel and unusual means of execution in Georgia.

With respect to his conviction for murder in Forsyth County, Potts makes essentially the same claims as numbers (vii), (viii), and (ix)-(xiii) of the petition relating to the Cobb County conviction, plus claims of double jeopardy, possible reliance on improper aggravating circumstances by the jury, sufficient evidence to establish insanity defense, and failure of the district court to instruct on mitigating circumstances.

denied authorizing the petitions. Faced with Potts' conflicting actions, the court directed Potts to be present at the June 26 hearing.

At the June 26 hearing, the court informed Potts that the only reason he was present was to ascertain whether he had indeed filed a second set of petitions and whether he wished to be represented by an attorney. Potts indicated that he wished to talk with a lawyer before he indicated whether he did authorize the filing of the second set of petitions, but that he did not wish to confer with Mr. Nursey. Potts indicated he wished to be represented by a Mr. Goldberg and a Mr. West. After conferring with Goldberg and West, Potts indicated that he desired they represent him in the proceeding and that he did authorize the filing of the second set of habeas corpus petitions. Mr. Goldberg and West subsequently indicated that Potts also wished Mr. Nursey to represent him. The court thereafter did not question Potts although he was present throughout the hearing, but instead, received legal arguments on whether there had been an abuse of the writ of habeas corpus and whether the dismissal of the prior petitions had been with or without prejudice.

Although the district court indicated the hearing would be devoted solely to legal questions, Potts' attorneys made clear they were prepared to present evidence which would explain why Potts was filing a second set of petitions and which would demonstrate the involuntariness of his withdrawal of his first set of petitions. Potts' attorneys alleged that Potts was filing his second set of petitions because he had indeed changed his mind. In an offer of proof, based on the brief interview with Potts at the initiation of the hearing, Potts' attorneys offered to place Potts on the stand to explain why he was filing his second set of petitions. Potts' attorneys further stated that Potts was pre-

pared to testify that the reason he gave up his earlier appeals was that he was afraid of the consequences and retaliation that he would suffer from prison authorities by reason of his pursuing his habeas petitions. Also, he would testify that he was afraid to continue to live under the conditions that he saw as being brutal, cruel and unusual, including his medical treatment.[11] They alleged Potts had reached a state of mental fatigue after filing his first set of petitions because of conditions at the institution where he was kept. They also alleged that when Potts filed his first set of federal habeas petitions, he was harassed by prison authorities, but when he withdrew the first petition, his treatment improved considerably. They further alleged that conditions under which Potts had been incarcerated for the past five years precluded anyone from making a valid waiver of a constitutional right. Potts' attorneys had present at the hearing experts who would testify as to Potts' mental state at the time he withdrew his first petitions and on his mental condition with respect to any issue of waiver or bypass or deliberate successive petitions. Potts' attorneys stated they were not alleging that Potts was not competent, but were alleging that there were "other pressures put on Mr. Potts and everyone else on death row that make them make decisions that are sometimes contradictory." Despite offering to place this evidence in the record at the hearing, the court refused to to take any testimony.[12]

[11] In his brief to this court, Potts alleges inadequate medical treatment for a bullet wound received when he was captured, as well as constant pain from the wound.

[12] The state did not deny these factual allegations but has had no opportunity to do so. Thus, the record with respect to the second set of petitions contains allegations of factual matters going to the issue of abuse and to the voluntariness of Potts' withdrawal of his first set of petitions with no substantive evidence tending to confirm or deny these allegations.

In an order dated June 26, 1980, the district court refused to stay Potts' execution and dismissed his second set of habeas petitions. The court held that abandonment at the federal habeas level, by itself, is sufficient to render any subsequent petition an abuse of the writ. The court prefaced its June 26 order by describing the June 10, hearing:

> Because of the potential finality of Mr. Potts' requests [to dismiss his first petitions] and to ensure that Mr. Potts' decision to abandon further legal action was made knowingly and intelligently, the court conducted a hearing on June 10, 1980, to determine if Mr. Potts had made a competent decision to abandon his right to federal habeas corpus review.

The court continued, quoting from *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963):

> [A] waiver may also be present
>
> > if . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Id. at 18, 83 S.Ct. at 1078.

The continued vitality of *Sanders* is demonstrated by the recent decision in *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980) [*cert. denied* 445 U.S. ____, [101 S.Ct. 239], 66 L.Ed.2d 111 (1980)]. Although the court determined that no abuse of the writ was presented by that case, it reaffirmed the requirement that where there has been " 'an intentional relinquishment or abandonment of a known right or privilege,' " which a petitioner subsequently attempts to raise, an abuse of the writ is present. *Id.* at 1006, *quoting Fay v. Noia*, 372 U.S. 391, 439 [83 S.Ct. 822, 849, 9 L.Ed.2d 837] (1963).

> From the evidence presented in the 'next friend' actions brought on Mr. Potts' behalf and in the proceedings concerning Mr. Potts' prior petitions, the court is compelled to find that there was an intentional, knowing, and unequivocal relinquishment of a known right which constituted a waiver of federal habeas corpus review . . . . That there was a waiver and an abandonment is established beyond a cavil.

The court further stated,

> If ever there is a situation where a finding of an intentional abandonment of a known right is demanded, this case presents it. By the same token, seeking another stay and consideration of substantively identical petitions constitutes an abuse of the writ as defined by *Sanders v. United States*, [373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)]. Having brought Mr. Potts before the court on those petitions for no purpose other than to determine whether or not he desired federal habeas corpus review, and having determined that he wished to abandon that right, the court determined that the matter was final . . . . Mr. Potts' decision was not simply a voluntary dismissal without prejudice; it was a final abandonment of a known right to federal review of his state convictions and sentences of death.

The district court made no findings as to the motive or reasons behind Potts' actions. Although noting that there is no present requirement that a habeas corpus petitioner make even a colorable claim of innocence, the district judge cited Potts' admission of guilt as a cumulative reason supporting the finding of abuse of the writ.

This court thereafter granted stays of execution on June 28, 1980, with respect to Potts' second set of petitions (numbers 80-7476 and 80-7477) and directed an expedited appeal. On July 1, 1980, the Supreme Court of the United States rejected the state's application to vacate

the stays in *Zant v. Potts*, ____ U.S. ____, 100 S.Ct. 3052, 65 L.Ed.2d 1138 (1980).

On July 7, 1980, Potts' attorneys took the unusual step of filing a notice of appeal with respect to the first set of habeas petitions (numbers 80-7664 and 80-7665). The district court denied Potts a certificate of probable cause with respect to these petitions, finding that no useful purpose would be served by allowing an appeal in those cases since, if Potts were successful in his appeal on the second set of petitions, the same issues would then be before the court for consideration on the merits. Potts then applied to this court for a certificate of probable cause to appeal and filed a motion for leave to proceed on appeal in forma pauperis. Potts explained that a certificate of probable cause with respect to the first set of habeas petitions was requested only as a precautionary measure. Potts' counsel explained that should a court find the dismissal in the first set of petitions to be something other than a voluntary dismissal pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, an appeal with respect to these petitions would be necessary. This court granted Potts' application for a certificate of probable cause and for leave to appeal in forma pauperis and ordered those appeals to be consolidated and expedited with the appeals in numbers 80-7476 and 80-7477.

ANALYSIS OF FACTS AND QUESTION PRESENTED

Although Potts has in the course of these cases filed a total of four habeas corpus petitions, we consider for purposes of applying the abuse doctrine, as did the district court, that this case is equivalent to the more typical situation where a second petition is filed which makes the

same claims as an earlier petition.[13] Two petitions were filed on June 4, one for the conviction in Cobb County and one for the conviction in Forsyth County, Georgia. They were consolidated. Similarly, the two petitions filed on June 26—each relating to one conviction—were consolidated. For convenience, we will often describe the first two petitions filed on June 4, as his first habeas petition, and the last two petitions filed on June 26, as his second habeas petition.

As we read the district court's order, the court there found an abuse of the writ with respect to the second petition on the sole ground that Potts had abandoned all rights to future federal habeas when he dismissed his first petition.[14] Potts' request for an evidentiary hearing to

[13] Both the state and the district court made clear at the June 26 hearing, and we agree, Potts cannot be held responsible for the "next friends" petition filed in his behalf as far as determining the number of petitions he has filed.

[14] Arguably, the district court gave two other grounds for finding an abuse. At one point, the district court noted, "By the same token, seeking another stay and consideration of substantively identical petitions constitutes an abuse of the writ . . . ." Insofar as the district court indicated by this that the filing of a second petition raising the identical grounds is *per se* an abuse of the writ, the court was mistaken.

> This Court has consistently interpreted the habeas corpus statutes as imposing no numerical limits on a state prisoner's access to the federal courts . . . . Instead, we have held that summary consideration of a petition is the appropriate remedy when an applicant seeks to relitigate a claim . . . . [T]o equate the filing of successive petitions with an 'abuse' of habeas is to misunderstand the extraordinary nature of the writ.

Hardwick v. Doolittle, 558 F.2d at 296 (5th Cir. 1977), *cert. denied* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978) (citations omitted).

Another ground arguably relied upon by the district court for finding an abuse was Potts' admission of guilt. Because the court cited this ground as being only cumulative of the abandonment ground, and because the state has not asserted this ground on appeal, we decline to consider it. *See Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

rebut the allegation of abuse was refused. The court made no finding with respect to why Potts brought and then dismissed his first petition or why he was filing his second petition. Nor did the district court make findings as to Potts' motives with respect to the two sets of petitions or with respect to any bad faith or purpose to vex or harass the court or to delay his execution by piecemeal litigation. Nor did the court address any equitable considerations or make any findings as to whether the ends of justice would be served by addressing Potts' second petition. The only factual finding by the court was that Potts' alleged abandonment on June 10 was knowing and voluntary. It deemed no other findings necessary to find an abuse with respect to the second, identical petition.

On appeal, Potts raises three substantive issues we must address. First, whether Fed.R.Civ.P. 41(a) was applicable to Potts' dismissal of his first petition so as to give him a right to dismiss his first petition without any procedural prejudice attaching to his claims. Second, whether an intentional and knowing waiver and abandonment of all rights to future federal habeas, made at the federal habeas level before any evidentiary hearing or response from the state, is alone sufficient to find an abuse with respect to a subsequent federal habeas petition raising the same issues. Third, whether the district court erred in denying Potts an evidentiary hearing after he filed his second habeas on the questions as to why he filed and dismissed his first petitions and whether his alleged intentional and knowing abandonment on June 10 was voluntary. We first discuss briefly the historical background of the abuse of the writ doctrine before discussing the issues.

LEGAL BACKGROUND

[1] The doctrine of abuse of the writ has developed as a result of the familiar rule of law that a denial of an application for habeas corpus is not *res judicata* with respect to subsequent applications. *Sanders v. United States*, 373 U.S. 1, 7, 83 S.Ct. 1068, 1072, 10 L.Ed.2d 148, 156 (1963); *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Salinger v. Loisel*, 265 U.S. 224, 230, 44 S.Ct. 519, 521, 68 L.Ed. 989 (1924). The Supreme Court has indicated that the inapplicability of *res judicata* to habeas has roots within our jurisprudential system based upon our concern that neither life nor liberty be deprived unconstitutionally:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra* (372 U.S. at 402), access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Sanders v. United States, 373 U.S. at 8, 83 S.Ct. at 1073.

Because of the inapplicability of *res judicata* to habeas corpus, prisoners have in the past frequently filed successive petitions, alleging claims already adequately determined in prior petitions, or alleging different claims which could have been adequately pleaded and adjudicated in prior petitions. In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline

to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal habeas court will adjudicate at least once the claims of a petitioner.

At present there are two statutes governing the discretion of a trial court to decline a § 2254 petition by a state prisoner.[15] First enacted was 28 U.S.C.A. § 2244(b) (West 1971), which reads:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual

---

[15] There are three statutes touching on the discretion of a trial court to decline to address successive or repetitious post-conviction petitions from federal prisoners. 28 U.S.C.A. § 2244(a) (West 1971); 28 U.S.C.A. § 2255 (West 1971); and Rule 9(b) of Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C.A. foll. § 2255 (West 1980).

These three statutes also reflect a concern that in the absence of abuse, a federal court will adjudicate at least once the claims of federal prisoners seeking post-conviction relief. § 2244(a) requires that the legality of the detention be "determined" on a prior application before a federal court may refuse to hear a subsequent application for habeas. Rule 9(b) says a federal court need not hear a successive § 2255 petition if a prior petition was determined "on the merits" or there is abuse with respect to a new claim raised. Section 2255 has the broadest language, stating that a successive § 2255 petition need not be heard if it asks for "similar relief." However, *Sanders* makes clear that a § 2255 petition is to be as readily available as an application for habeas and establishes guidelines for determining the discretion of federal courts to decline to hear successive § 2255 petitions. We discuss those guidelines more fully below.

> or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

The legislative history indicates that this statute was enacted to introduce a qualified application of the doctrine of *res judicata* to habeas corpus and arose out of a concern for the rapidly increasing number of meritless habeas petitions from state prisoners. S.Rep.No.1797, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Adm.News 3663. By its terms, it provides no authority to dismiss the instant petitions, since it authorizes a district court not to entertain a subsequent application only if there has been an "evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law." Here, the trial court has held no hearings with respect to the factual or legal claims alleged in Potts' petitions, nor has it relied on any findings by state courts in addressing factual or legal claims as it is authorized to do in certain circumstances by 28 U.S.C.A. § 2254(d) (West 1977).

The second statute applicable to a successive or repetitious petition is Rule 9(b) of Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S. C.A. foll. § 2254 (West 1977):

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

By its language, Rule 9(b) also does not apply since Potts' second set of petitions failed to allege new or different grounds from his first petitions, and there was no determination on the merits of the first petitions.[16]

Although we have noted that the two statutes respecting successive petitions by state prisoners are not literally applicable to the instant case, we are not left without guidance since Rule 9(b) makes clear that it incorporates and preserves existing case law with respect to abuse of the writ. More specifically, as enacted by Congress, Rule 9(b) codifies the seminal case of *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) with its guidelines concerning abuse of the writ. *Advisory Committee Note*, Rule 9, Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C.A. foll. § 2254); H.R.Rep.No.1471, 94th Cong., 2d Sess., 5-6, *reprinted in* [1976] U.S.Code Cong. & Adm.News, pp. 2478, 2482; *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir.), *cert. denied* 445 U.S. ____, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980); *Galtieri v. Wainwright*, 582 F.2d 348, 356 & n.18 (5th Cir. 1978) (en banc).[17]

In *Sanders v. United States*, the Supreme Court addressed the question: in light of the inapplicability of *res judicata* to habeas corpus, what significance, in determining whether to entertain a subsequent petition, should a district court give to the denial of prior applications for habeas relief. Although *Sanders* was concerned with a § 2255 motion, the Court made clear that the principles

---

[16] We discuss more fully below slip op. at p. 4253, at pp. ____, ____ why we conclude there has been no determination on the merits of Potts' claims.

[17] It has been noted that § 2244(b) also has been interpreted as a codification of *Sanders*. *Paprskar v. Estelle*, 612 F.2d at 1006, n.11.

it was there announcing concerning successive petitions applied generally to applications for federal habeas. 373 U.S. at 15, 83 S.Ct. at 1077. *See also Advisory Committee Notes,* Rule 9(b) of the Rules Governing Section 2254 Cases in United States District Courts (28 U.S.C.A. foll. § 2254); *Paprskar v. Estelle, supra.*

Sanders divided successive applications for habeas into two situations. The first classifications specified the principles governing successive motions on grounds previously heard and determined:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Sanders v. United States, 373 U.S. at 15, 83 S.Ct. at 1077. Here, the notion of abuse of the writ does not arise. Instead, the court, in deciding whether to address a subsequent petition, ascertains whether there has been a determination on the merits and whether the ends of justice would be served by a redetermination on the merits. The criterion of the ends of justice typically involves looking at objective factors, such as whether there was a full and fair hearing with respect to the first petition, and whether there has been an intervening change in the law. 373 U.S. at 16-17, 83 S.Ct. at 1077-78. However, the Supreme Court was careful not to foreclose other factors which might be relevant in a determination of the ends of justice. *Ibid.*

[2] The second classification dealt with successive applications presenting different grounds from those pre-

sented in a prior application and with successive applications containing the same ground earlier presented but not adjudicated on the merits. It is with respect to this second classification that the notion of abuse of the writ is applicable. The Supreme Court stated that a district court can avoid full consideration of the merits with respect to the second type of application only if there has been an abuse of the writ. In discussing what constitutes an abuse of the writ, the Supreme Court stated:

> To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that 'habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 [73 S.Ct. 391, 397, 97 L.Ed. 549] (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable.' *Fay v. Noia, supra* (372 U.S. at 438 [83 S.Ct. at 848]). Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo* [*v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999] the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Sanders v. United States, 373 U.S. at 17-18, 83 S.Ct. at 1078-79.

Sanders also incorporated within the guidelines defining the nature of abuse of the writ the principles enunciated in *Fay v. Noia*, 372 U.S. at 438-440, 83 S.Ct. at 848-849, and *Townsend v. Sain*, 372 U.S. 293 at 317, 83 S.Ct. 745 at 759, 9 L.Ed.2d 770, *Sanders v. United States*, 373 U.S. at 18, 83 S.Ct. at 1078. The section of *Fay v. Noia* referred to by the *Sanders* Court announces the familiar rule that district judges may deny relief to an applicant who has deliberately bypassed the orderly procedure of state courts. The Court stated that the definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461—*i. e.*, the intentional relinquishment or abandonment of a known right or privilege—was one necessary element *inter alia* in finding a deliberate bypass. *Fay v. Noia*, 372 U.S. at 438-39, 83 S.Ct. at 848-49. The principle found in the section of *Townsend v. Sain* referred to by the *Sanders* Court states that if "for any reason not attributable to the inexcusable neglect" of a state petitioner, evidence crucial to adequate determination of the constitutional claim was not developed in state court, a hearing in federal court is compelled. *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 1078.

Several broad principles in addition to those enunciated in *Sanders*, arising out of concern that abuse of the writ not become a substitute *res judicata*, have been enunciated in other cases. Within this circuit, we have concluded, "The 'abuse of the writ' doctrine is of rare and extraordinary application." *Paprskar v. Estelle*, 612 F.2d at 1007; *Hardwick v. Doolittle*, 558 F.2d 292, 296 (5th Cir. 1977), *cert. denied* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d

801 (1978); *Simpson v. Wainwright*, 488 F.2d 494, 495 (5th Cir. 1973); *see also Galtieri v. Wainwright*, 582 F.2d 348, 368 (5th Cir. 1978) (en banc) (J. Goldberg, dissenting).[18] This circuit, amplifying on *Sanders*, has stated that the equities of the situation and the conduct of the petitioner are relevant to the determination of whether an abuse has occurred. *Paprskar v. Estelle, supra.* If a petitioner is able to present some "justifiable reason" explaining his actions, reasons which "make it fair and just for the trial court to overlook" the allegedly abusive conduct, the trial court should address the successive petition. *Price v. Johnston*, 334 U.S. 266 at 291, 68 S.Ct. 1049 at 1063, 92 L.Ed. 1356; *Paprskar v. Estelle, supra.*

Finally, and significantly, the Supreme Court in *Sanders* stated that no matter into which classification a successive petition fell, a district judge always has the discretion—and sometimes the duty—to reach the merits.

> The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without con-

---

[18] The Supreme Court apparently attempted to increase the discretion permitted district courts to refuse to entertain successive petitions when it proposed the Rules Governing Section 2254 Cases. The Supreme Court's version of Rule 9(b) stated that a trial court need not entertain a successive petition alleging a new or different ground if failure to assert that ground in the prior petition was "not excusable." Congress, in enacting these proposed rules, changed the Supreme Court's language to "abuse of the writ" because of concern that the Supreme Court's language would give district courts too broad a discretion to dismiss successive petitions. H.Rep.No.94-1471, 94th Cong., 2d Sess., *reprinted in* [1976] U.S.Code Cong. and Adm. News, 2478.

> sideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits.

Sanders v. United States, 373 U.S. at 18-19, 83 S.Ct. at 1078-79.

WHETHER POTTS' ABANDONMENT WAS TANTAMOUNT TO RULE 41(a) DISMISSAL

[3] Potts raised a novel argument below, and before this court, that as a matter of law it is inappropriate for the court to apply the abuse of the writ doctrine in the context of this case. He contends that because the state had not filed any responsive pleadings at the time of his withdrawal of his first petitions, he had a right voluntarily to withdraw these petitions without any procedural prejudice whatsoever. He grounds his argument on Rule 11 of the Rules Governing § 2254 Cases (28 U.S.C.A. foll. § 2254) which reads,

> The Federal Rules of Civil Procedure, to the extent that they are inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

as well as upon Rule 41(a) of the Federal Rules of Civil Procedure, providing that a plaintiff may dismiss an action without order of the court and without prejudice by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first. As with ordinary civil plaintiffs, he maintains that as a habeas petitioner, he has a right to dismiss a habeas petition in these circumstances under Fed.R.Civ.P. 41(a) without any prejudice whatsoever attaching.

If Potts' position were correct, a habeas petitioner on

death row could, with no fear of adverse effects, file a first petition immediately before his scheduled execution date and then subsequently dismiss the petition after his scheduled execution date had passed, as did in fact occur here. This action could be part of a conscious strategem to delay the execution. Because we think that such action is revelent evidence as to whether or not there has been an abuse of the writ, we believe that the blind application of Fed.R.Civ.P. 41(a) to the dismissal of a prior application would be inconsistent with the legal principles above set out mandating that the problem of successive applications be governed by the abuse of the writ doctrine.[19] Accordingly, Potts' position in this regard is rejected.

DOES A KNOWING AND INTENTIONAL WAIVER PER SE CONSTITUTE AN ABUSE OF THE WRIT OF HABEAS CORPUS?

[4] The district court held that Potts intentionally abandoned his federal corpus rights and that this rendered his subsequent petition an abuse of the writ. Despite Potts' allegations of reasons justifying his actions, and despite his proffer of evidence, the court did not hold an evidentiary hearing. The narrow and important issue facing us on this appeal is whether or not the knowing and

---

[19] Although we think Potts' dismissal of his first petition is relevant in determining abuse with respect to the second petition, we conclude below that evidence with respect to any reason of justification for Potts' actions must also be considered. It is unthinkable that a single dismissal, which is allowed routinely to all civil litigants under Rule 41(a), could, by itself, and in the absence of proof of intent to litigate in piecemeal fashion or to vex, harass or delay, constitute an abuse with respect to a subsequent petition. In the instant case on remand, the fact of the dismissal of the first habeas petition will be relevant evidence on the abuse issue, along with evidence of any motivation or justification therefor, including any possible good faith belief that he had a one-time right to dismiss under Rule 41(a).

intentional waiver, pursuant to the classic definition enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461, of Potts' federal habeas corpus rights renders a subsequent petition an abuse of the writ, without regard to any justifiable reasons Potts may have had for his initial waiver or subsequent petition.[20]

The district court relied on dicta from *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980), for the proposition that an abuse of the writ is present where there has been " 'a intentional relinquishment or abandonment of a known right or privilege.' " *Paprskar*, 612 F.2d at 1006, quoting *Fay v. Noia*, 372 U.S. at 439, 83 S.Ct. at 849.

We believe the district court was lured into error by the citation out of context of the *Paprskar* and *Fay v. Noia* dicta. Full quotation of the pertinent portion of *Fay v. Noia* demonstrates that the Supreme Court saw the doctrine of abuse of the writ as an equitable principle:

> [W]e recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573, 73 S.Ct. 391, 397, 97 L.Ed. 549, 558 (dissenting opinion). Among them is the principle that a suitor's conduct in relation

---

[20] For purposes of the discussion in this section, we assume *arguendo* that Potts' waiver was knowing and voluntary. Below we conclude that the district court's finding of voluntariness must be vacated and that on remand the issue of the waiver must be the subject of an evidentiary hearing.

to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466, 146 A.L.R. 357—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356, 1372.

372 U.S. at 438-39, 83 S.Ct. at 848-49. Taken in context, *Fay v. Noia* suggests that a waiver or abandonment must not only be intentional, as tested under *Johnson v. Zerbst*, but must also be under such circumstances "as to justify withholding federal habeas corpus relief." 372 U.S. at 399, 83 S.Ct. at 827. In other words, it must be tested under equitable principles. It must amount to "conduct . . .

[such as] may disentitle him to the relief he seeks." The reason for petitioner's default or abandonment must be one that "whether for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate bypassing of state procedures." The *Fay v. Noia* court faced the issue of whether a state prisoner's intentional failure to pursue his direct appeals in state court should bar his subsequent federal habeas corpus rights.[21] The flavor of the term "deliberate bypassing of state procedures" is revealed by the following quotation:

> We fully grant . . . that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts.

372 U.S. at 433, 83 S.Ct. at 846.

Finally, the actual holding in *Fay v. Noia* demonstrates that the intentional abandonment of a right does not, by itself, constitute an abuse of the writ. The Supreme Court assumed that Noia knowingly chose to forego his right of direct appeal in state court; however, because this choice was made to avoid the risk of a death sentence—should Noia's conviction have been overturned on the state appeal and a retrial ordered—the Supreme Court held that: "Under no reasonable view can the state's version of Noia's reason for not appealing support an inference of deliberate bypassing of the state court system." 372 U.S. at 439, 83 S.Ct. at 849. Thus, in *Fay v. Noia* itself, there was an intelligent abandonment, but the Supreme Court

---

[21] The institutional concern in *Fay v. Noia* was one involving considerations of comity and the language concerning waiver dealt with abandonment of state means to vindicate federal claims. In the instant case the institutional concern is the avoidance of piecemeal litigation and the avoidance of successive applications whose purpose is to vex, harass or delay.

held, in light of Noia's reasons for that choice, that his actions did not constitute a "deliberate circumvention of state procedures." 372 U.S. at 440, 83 S.Ct. at 849. "Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief." 372 U.S. at 399, 83 S.Ct. at 827.

As mentioned above, the seminal case is *Sanders, supra,* which expressly formulated "rules to guide the lower federal courts" in dealing with "successive applications for federal habeas corpus and motions under Section 2255." 373 U.S. at 15, 83 S.Ct. at 1077. For clarity of understanding, we repeat the two categories into which *Sanders* divided its guidelines: first, cases in which a subsequent habeas petition raised a ground which had been determined on the merits adversely to the applicant in a prior habeas petition; and second, cases in which a subsequent habeas petition raises a new ground, or the "same ground [that] was earlier presented but not adjudicated on the merits." 373 U.S. at 17, 83 S.Ct. at 1078.

The instant case is governed by the guidelines set out in *Sanders'* second category. The grounds of Potts' second habeas petition are substantively the same as those in his first habeas petition. However, Potts' first petition was never adjudicated on the merits. The state does not contend otherwise. *Sanders* explains clearly what a denial on the merits means:

> The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. *See Hobbs v. Pepersack,* 301 F.2d 875 (CA4th Cir. 1962). This means that if factual issues raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved

these issues, an evidentiary hearing was held. *See Motley v. United States*, 230 F.2d 110 (CA5th Cir. 1956); *Hallowell v. United States*, 197 F.2d 926 (CA5th Cir. 1952).

373 U.S. at 16, 83 S.Ct. at 1077. Potts' first petition did raise numerous factual issues; there was no evidentiary hearing and there was no determination on the basis of the files and records in the case; accordingly, there was no adjudication on the merits.

We turn, therefore, to the guidelines enunciated by *Sanders* for second category cases: 'Full consideration of the merits of the new application can be avoided *only* if there has been an abuse of the writ." 373 U.S. at 17, 83 S.Ct. at 1078 (emphasis added). It is significant that *Sanders* establishes abuse of the writ as the *only* theory justifying refusal to reach the merits of a "second category" habeas petition, such as Potts'. Therefore, unless an intentional waiver or abandonment of one's habeas rights also constitutes a *per se* abuse, it is clear that the district court erred in denying the writ on that basis alone.

Confirming our discussion of *Fay v. Noia*, *Sanders* clearly places the abuse doctrine in context as one "governed by equitable principles," i. e., "a suitor's conduct . . . may disentitle him to the relief he seeks." 373 U.S. at 17, 83 S.Ct. at 1078 (quoting from *Fay v. Noia*, 372 U.S. at 438, 83 S.Ct. at 848). The following phrases provide some hint of what the Supreme Court deemed to constitute an abuse: "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U.S. at 18, 83 S.Ct. at 1078. Significantly, the *Sanders*' court ex-

pressly incorporates the principles developed in *Fay v. Noia*, 372 U.S. at 438-40, 83 S.Ct. at 848-849 (quoted in part above), and *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 1078, as the "test governing whether a second or successive application may be deemed an abuse . . . of the writ." We have seen that *Fay v. Noia* placed the abuse doctrine in its context as an equitable principle. *Townsend v. Sain* referred to the *Fay v. Noia* standard as one of "inexclusable neglect." 372 U.S. at 317, 83 S.Ct. at 759. For the instant case, however, the most significant aspect of the *Fay v. Noia* elaboration of the tests governing the abuse doctrine is the holding itself that Noia's intentional abandonment of his direct state appeal right did not constitute an abuse because his actions were justified.

To support its conclusion that abandonment alone is sufficient to find abuse, the district court also relied upon the language of *Sanders* stating that if a prisoner deliberately abandons a ground, as did the petitioner in *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924), an abuse might be found. We believe the district court misread this portion of *Sanders*. The cite to *Wong Doo* occurs in the paragraph discussing the need to look to the petitioner's conduct and equitable principles in determining abuse. This is the paragraph that ends with the oft-cited standard that abuse is to be found if there is a purpose to litigate in piecemeal fashion or to vex, harass or delay. Earlier in the *Sanders* opinion, the Court characterized Wong Doo's actions as being in bad faith. 373 U.S. at 10, 83 S.Ct. at 1074. Moreover, the actual opinion in *Wong Doo* demonstrates the Court's belief that Wong Doo's actions were in bad faith. The Supreme Court held that Wong Doo's failure to produce evidence at his first ha[illegible]s hearing with respect to a ground alleged,

and his reservation of that ground to support a subsequent habeas petition, demonstrated a lack of good faith and amounted to an abuse of the writ. The Supreme Court stated: "The petitioner had full opportunity to offer proof of [the ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abuse of the writ of habe corpus. *No reason for not presenting the proof at the outset is offered.*" 265 U.S. at 241, 44 S.Ct. at 525 (emphasis added). This passage, read in its entirety, indicates the Supreme Court's conviction of the bad faith of the petitioner in *Wong Doo*. Moreover, the last sentence in the above quotation is the factor which distinguishes the instant case. Here, Potts alleged reasons justifying his actions, requested a hearing thereon, and proffered evidence. The treatment of *Wong Doo, supra*, in subsequent Supreme Court cases emphasizes the significance of the last sentence in the above quotation, and makes clear that *Wong Doo* is consistent with the notion that the abuse doctrine is an equitable principle. See *Price v. Johnston*, 334 U.S. at 291, 68 S.Ct. at 1063; *Sanders*, 373 U.S. at 17-18, 83 S.Ct. at 1078-79.

This circuit recently announced, in a slightly different context, the very principles which we have deduced from *Sanders* and *Fay v. Noia*. In *Sosa v. United States*, 550 F.2d 244 (5th Cir. 1977), a federal prisoner intentionally and voluntarily dismissed his direct appeal from his conviction and sentence in district court. The issue we faced there was whether this "deliberate bypass" barred his subsequent § 2255 motion.[22] In holding that the § 2255 motion

[22] Although *Sosa* involved a § 2255 motion, this circuit has indicated that holdings respecting deliberate bypass in the context of federal

was not barred, we recognized that "the term 'deliberate bypass' is not self-executing . . . it encapsulates an equitable doctrine." 550 F.2d at 247. We said:

> Our own jurisprudence traces a similar course, and consistently returns to the holding that the *motivation or reason for the failure to appeal*, and not the mere data that an appeal was not taken or completed, determines whether a section 2255 motion ought to be entertained.

550 F.2d at 247 (emphasis added). We also said:

> Our cases firmly reject any rigid application of the rule against surrogate appeals. Instead, they establish the principle that habeas will not be permitted to substitute for an appeal when the choice to seek habeas is made in order to seize some legal or tactical advantage for the defendant. No such ulterior purpose has been shown to have directed Sosa's actions.

550 F.2d at 248-49.[23]

---

habeas and § 2255 motions are equally applicable to one another. *McKnight v. United States*, 507 F.2d 1034 (5th Cir. 1975). Obviously the institutional concerns in *Sosa* are different from those we now face. There we addressed the institutional concern that § 2255 motions not be used as a substitute for a direct appeal, whereas in the instant case the institutional concern is avoidance of needless piecemeal litigation and the avoidance of collateral proceedings whose purpose is to vex, harass or delay. Although the nature of the institutional concern is different, the overriding principle in both kinds of cases is that habeas corpus is governed by equitable principles.

[23] Other cases in this circuit echo the statement in *Sosa*. *Montgomery v. Hopper*, 488 F.2d 877, 879 (5th Cir. 1973) ("Not even an outright failure to file an appeal would, of itself, constitute a deliberate bypass in the absence of clear proof that the decision not to appeal was made knowingly and understandingly *in order to secure some benefit to the petitioner*." (emphasis added)); *McKnight v. United States*, 507 F.2d 1034, 1036 (5th Cir. 1975) ("[T]he emphasis is not merely on the fact that an appeal was not taken, but rather on why the appeal was not taken."); *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978) ("[P]roof of bypass typically involves a showing that the prisoner secured some tactical advantage by not pressing his claim earlier."); *see also Haley v. Estelle*, 632 F.2d 1273, 1275 (5th Cir.,

Although none of the authorities discussed above involve the precise context of the instant case—an abandonment of all federal habeas corpus rights pursuant to the withdrawal of a first habeas petition—the guidelines provided by *Sanders* clearly control. The instant case is encompassed within *Sanders'* second category, *i. e.*, presenting in a subsequent habeas petition the "same ground . . . earlier presented but not adjudicated on the merits." 373 U.S. at 17, 83 S.Ct. at 1078. Accordingly, we conclude that the equitable principles above discussed provide the standards governing the determination of abuse in this case. On the basis of the foregoing authority, we reverse the district court's legal conclusion that a knowing and intentional waiver necessarily renders any subsequent habeas petition an abuse of the writ, without regard to reasons which might be offered to justify the applicant's conduct. Our conclusion that the district court erred by not considering the reasons proffered by Potts to justify his actions is bolstered by our discussion in the next section of the cases holding that a prisoner must be

---

1980) ("The principle behind Rule 9(b) is to dismiss those petitions that constitute 'needless' piecemeal litigation or whose 'purpose is to vex, harass, or delay.' "); and *Strickland v. Hopper*, 571 F.2d 275 (5th Cir. 1978), *cert. denied* 439 U.S. 842, 99 S.Ct. 135, 58 L.Ed.2d 141 (1978) (where this court affirmed the denial of a federal habeas corpus petition finding that the state prisoner had deliberately bypassed the orderly procedures of the state courts when he escaped and became a fugitive from justice, thus frustrating his state court motion for new trial. Although the court did not expressly speak in terms of equitable principles, the decision is clearly consistent therewith). *Cf. Wilwording v. Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied* 420 U.S. 912, 95 S.Ct. 835, 42 L.Ed.2d 843 (1975).

Although Potts arguably has achieved a tactical advantage, *i. e.*, the delay of his execution, there is evidence in the record he neither intended nor wanted this result. The evidentiary hearing on remand will afford an opportunity to inquire into this and other aspects of Potts' actions and test this conduct against the equitable principles comprising the abuse doctrine.

afforded an opportunity to explain an alleged abuse. We remand with instructions that the district court hold an evidentiary hearing to inquire into the reasons alleged by Potts to justify his actions, and to make findings of fact with respect thereto.

WHETHER A HEARING SHOULD HAVE BEEN HELD ON ISSUE OF ABUSE

[5] During the hearing on June 26, Potts' attorneys maintained that if the district court was prepared to reject his second petitions for being an abuse of the writ, they had a right to present evidence explaining Potts' action and rebutting the state's pleading of abuse. The district court permitted Potts' attorneys a brief offer of proof in which they quickly described various factors on which they were prepared to present evidence, some of which went to the voluntariness of Potts' withdrawal of his first petition. They also stated that Potts himself were prepared to explain his actions. The district court, however, refused to grant an evidentiary hearing on any issue relevant to abuse. On the basis of the evidence addressed in the "next friends" petition and in the June 10 hearing, the district judge was convinced that Potts had made an intentional and voluntary waiver of his right to federal habeas, and that this meant any subsequent petition was an abuse. We conclude that the court should have granted a hearing on the issue of abuse. Our holding in this matter is divided into two parts. In the first part, we discuss the law respecting the need for an evidentiary hearing with respect to the issue of abuse even assuming Potts' abandonment was indeed knowing and voluntary. In the second part, we discuss the need for an evidentiary hearing to determine the voluntariness of Potts' abandonment. By separating the issues to be determined in an

evidentiary hearing into these two contexts, we hope to clarify the district court's task on remand.

(i) Hearing on issue of abuse.

[6] Even if Potts' waiver and abandonment were as a matter of fact knowing and voluntary, an evidentiary hearing in this case is nevertheless necessary to determine whether an abuse of the writ has occurred. This holding follows from our holding above that an intentional abandonment does not, by itself, constitute an abuse, and from the cases discussed below holding that a petitioner must have an opportunity to rebut and explain any allegation of abuse. Such a procedure is consistent with the concern for the equities of a prisoner's action when abuse is alleged.

Prior law indicates that a petitioner's right to rebut or explain any alleged abuse is broad and does not depend upon the type of abuse alleged. *Price v. Johnston*, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356, 1373 (1948), establishes that the government has the burden of first pleading abuse of the writ, a burden met here. *See also Sanders v. United States, supra.* It further establishes that once the government has met its burden by pleading abuse of the writ, the petitioner must be afforded an opportunity to present evidence rebutting the government's pleading:

> Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often

> shrouded in ambiguity where a petition is dismissed without an expressed reason. And the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition.

Price v. Johnston, 334 U.S. at 292-93, 68 S.Ct. at 1063-64. We agree with the Fourth Circuit in *Johnson v. Copinger*, 420 F.2d 395 (4th Cir. 1969), which held that the obligation placed upon a petitioner to demonstrate that his action is excusable and does not amount to an abuse of the writ, carries a concomitant obligation on the part of the court to afford a petitioner an opportunity to make his explanation, if he has one. 420 F.2d at 399. *Fay v. Noia*, relying on *Price v. Johnston*, indicated that a federal court may find a deliberate bypass of state procedures only if the federal court is satisfied by a hearing or some other means of the facts surrounding the applicant's default. 372 U.S. at 439, 83 S.Ct. at 849. *See also Sanders v. United States*, 373 U.S. at 20-21, 83 S.Ct. at 1079-80, remanding for a hearing on the abuse issue raised there. Moreover, the *Advisory Committee Note* with respect to Rule 9(b) indicated that it is expected that a petitioner would have an opportunity to explain any alleged abuse, citing *Johnson v. Copinger, supra*.[24] To aid in this endeavor, the

---

[24] The Fourth Circuit in *Johnson v. Copinger*, where a different ground for abuse was alleged, also stated:

> Therefore, we hold that in a case in which the district judge believes, after examining the petition for habeas corpus, that the petitioner may have in an earlier petition deliberately withheld grounds then available to him, the judge may not dismiss the petition on the ground of abuse of the writ without first giving notice to the petitioner that such action is contemplated and affording him an opportunity to amend his petition to offer any explanation he may have which would justify his earlier omission or show that the omission was not deliberate, or that the grounds were not then known to him.

420 F.2d at 399.

drafters of the Rules appended to the Rules a recommended form by which a court could inform a petitioner his application was in danger of being dismissed as an abuse, thus affording him an opportunity to present mitigating facts.[25]

This circuit has not been insensitive to the requirement that a federal habeas or § 2255 petitioner must have an opportunity to rebut an allegation of abuse. Where there is alleged a waiver of a constitutional right because of a deliberate bypass, the most frequently claimed form of abuse, this circuit has many times remanded cases to district courts for an evidentiary hearing on the issue of a bypass.[26] Indeed, with respect to whether there has been a waiver by deliberate bypass, this circuit has stated that the standards for finding such a waiver are rigid. *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1987); *Montgomery v. Hopper*, 488 F.2d 877 (5th Cir. 1973).

An exception we have found to this opportunity to rebut an alleged abuse is the rule derived in § 2255 cases that an evidentiary hearing on a deliberate bypass issue

---

[25] The forms appended by Rules for Governing Section 2254 Cases have not been used in any of Potts' petitions. Instead, his petitions apparently have been prepared by attorneys, using the *pro se* petition form with a space at the end for his signature.

[26] *McKnight v. United States*, 507 F.2d 1034 (5th Cir. 1975); *Bailey v. State of Alabama*, 505 F.2d 1024 (5th Cir. 1975); *Morris v. United States*, 503 F.2d 457 (5th Cir. 1974); *Montgomery v. Hopper*, 488 F.2d 877 (5th Cir. 1973); *Collier v. Estelle*, 488 F.2d 929 (5th Cir. 1974); *Montgomery v. United States*, 469 F.2d 148 (5th Cir. 1972); *Montgomery v. Caldwell*, 457 F.2d 767 (5th Cir. 1972); *Johnson v. Smith*, 449 F.2d 127 (5th Cir. 1971); *Bonaparte v. Smith*, 448 F.2d 385 (5th Cir. 1971). Other circuits also have remanded cases for evidentiary hearings concerning waiver by deliberate bypass. *United States v. Barnes*, 610 F.2d 888 (D.C. Cir. 1980); *Zarola v. Crowen*, 433 F.2d 335 (9th Cir. 1970). *See also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir., 1980) ("Where substantial conflict exists, it may be necessary to hold a hearing to determine the actual facts.")

need not be held when the record has sufficient evidentiary development to clearly show a deliberate bypass. *Coco v. United States*, 569 F.2d 367 (5th Cir. 1978); *Buckelew v. United States*, 575 F.2d 215 (5th Cir. 1978) (dictum). We have applied the same rule in the context of a deliberate bypass of state procedure where the record clearly indicates a deliberate bypass. *Johnston v. Estelle*, 548 F.2d 1238 (5th Cir.), *cert. denied* 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 118 (1977).

We conclude that the record in the instant case does not clearly show an abuse, and accordingly, we hold that the district court erred in failing to hold an evidentiary hearing.[27] Potts has alleged reasons to justify his actions, has requested a hearing, and has even made an abbreviated proffer of evidence. For example, at the June 10 hearing, before the issue of abuse was even raised, Potts gave a reason for withdrawing his first habeas petition, which the district court on remand may well find to be plausible, and which would be evidence of an absence of abuse. He stated that he filed the first habeas petition to comfort his brother, and in the belief that no stay would be granted. This explanation is consistent with Potts' refusal to pursue any attack on his conviction from late 1979, until June 4, 1980, and reflects what the district court on remand may well find to be a natural familial concern considering the emotional circumstances in which Potts found himself. Indeed, the district court gave as one

---

[27] Of significance in this regard is the fact that Potts was in the courtroom on June 26, unlike most prisoners who cannot be brought to court without inconvenience. Because of the seriousness of Potts' sentence and because of the slight inconvenience to have Potts explain his actions at the June 26 hearing, the duty to give a prisoner the opportunity to rebut an allegation of abuse becomes even more stringent.

reason for finding Potts competent to dismiss his first petition his explanation that he filed the petition solely to comfort his brother. We do not believet hat the chronology of the events—the fact that the first petition was filed on the day before the scheduled June 5 execution date and the fact that the second petition was filed on June 25, six days before the July 1 execution date—clearly shows an abuse in this case where the above-mentioned and other explanations have been proffered to justify Potts' actions, and especially when the emotionally charged atmosphere surrounding Potts is considered. Nothing in the record clearly shows that the alleged justifications are implausible on their face. We conclude, therefore, that the district court should on remand afford Potts an opportunity to rebut the state's allegation of abuse, that the district court should hold an evidentiary hearing to inquire into the explanations offered by Potts to justify his actions and to hear any evidence in opposition which the state might offer, and that the district court should, applying the equitable principles set forth in this opinion, make findings of fact and conclusions of law as to whether or not Potts has abused the writ of habeas corpus.

(ii) Hearing on issue of voluntariness

For the sake of the preceding arguments, we have assumed that Potts' abandonment of federal habeas rights was knowing and voluntary. Before the district court in his second petition and before this court, Potts has maintained that his abandonment was not voluntary because of, *inter alia*, harassment from prison authorities, inadequate medical care and constant pain from a bullet wound, discontent of family members at the prospect of Potts' continued incarceration, and the "circus atmosphere" surrounding his case. Although Potts' attorneys

requested an evidentiary hearing on these factual allegations relevant to voluntariness, and made an offer of proof of evidence they were then prepared to present on the issue of voluntariness, the district court refused to grant a hearing on this issue. The district court, in its order of June 26, held that on the basis of the evidence in the "next friends" petitions and in the June 10 hearing, there could be no question but that Potts had made an intentional, knowing and voluntary waiver of his right to federal habeas. In relying on evidence in the "next friends" petition and in refusing to grant Potts an evidentiary hearing on the issue of voluntariness, the court erred.

In his brief, Potts, without citation of authority, argues that the district court's reliance on facts adduced at the "next friends" proceeding, which Potts had not authorized and at which he had neither been present nor represented by counsel, was improper. The state, also without citation of authority, relies upon the fact that the district court heard evidence respecting Potts' competence at the "next friends" hearing to bolster the district court's finding of a voluntary abandonment. The court's June 26 order does not indicate to what extent the district court relied on evidence presented in the "next friends" hearing, but does clearly indicate that such evidence was considered in finding Potts' actions on June 10 to be voluntary. We are not told whether the court looked to the testimony of the psychologist, the documentary evidence, or the videotape of Potts which was introduced in the "next friends" hearing.[28] Nor are we told the content of this evidence. Potts

[28] During the June 10 hearing, the district court asked Potts whether the views he was expressing on June 10 were the same as those in the videotape of his June 2 news conference. Potts gave an ambiguous answer to this question. (Tr., June 10, 1980, hearing, p. 11). Accord-

was not a party to the "next friends" petition, and the state has made no claim that Potts is collaterally estopped from contesting any issue decided in the "next friends" proceedings or that judicial notice [29] of such evidence was appropriate.[30] Nor did the district court offer any justification for its reliance on evidence presented in a suit to which Potts was not a party. We conclude the court erred in relying on evidence presented in the "next friends" hearing and that such error requires a remand.

Moreover, the district court should have granted a hearing on the issue of the voluntariness of Potts' abandonment, because Potts on June 26 made extensive factual allegations which were not contradicted by his testimony in the June 10 hearing and which raised issues outside the record and not resolvable through the personal knowledge of the district court judge. Among these allegations were Potts' assertion of harassment from prison authorities, pressure from some family members to dismiss his habeas petitions, constant pain resulting from a bullet wound and inadequate medical care of the wound, and a "circus atmosphere" surrounding his case. Our holding on this point is grounded in *Sanders* as well as cases dealing with the analogous situation where a federal prisoner subse-

---

ingly, we are unable to determine whether Potts adopted the views expressed in the videotape as his own. Regardless of this ambiguity, the fact remains that we do not know whether the district court relied on the documentary evidence and psychologist's testimony in the "next friends" hearing as well.

[29] "Judicial notice is generally defined as a judge's utilization of knowledge other than that derived from formal evidentiary proof in the pending case." 1 Weinstein, *Evidence* 200 [01] (1979).

[30] We do not suggest that either collateral estoppel or judicial notice would be appropriate. On the contrary, we would anticipate serious problems with either theory in the context of this case. However, since neither theory is asserted by the state, we express no opinion thereon.

quently attacks his guilty plea in a § 2255 motion before the same judge who accepted the guilty plea after duly complying with Fed.R.Crim.P. 11.

In *Sanders*, the petitioner attacked his waiver of indictment and guilty plea before the same judge who accepted the waiver and plea on grounds that he was mentally incompetent because of narcotics administered to him before his appearance before the court. The petitioner submitted an affidavit in support of his allegation of incompetency. The Supreme Court held that the petitioner was entitled to a hearing since he alleged matters outside the record. Although the Court acknowledged that the petitioner's actions before the district court in waiving indictment may have appeared in all respects normal, the record there still did not conclusively show his allegation to be goundless. The Court also found corroboration of the petitioner's claim in the fact that petitioner asked for treatment as an addict during his waiver of indictment.

[7] There is further support for our conclusion in the analogous situation where a federal prisoner attempts to attack a guilty plea in a § 2255 motion filed with the same judge who took the guilty plea after following the procedure of Fed.R.Crim.P. 11. Frequently, federal prisoners who swore their plea was voluntary and testified as to facts surrounding that plea, will later attack the plea as being involuntary and attempt to recant the testimony given at the Rule 11 proceeding. The parallels to the instant case are obvious.[31] In the context of a § 2255

---

[31] While the cases in which a § 2255 petitioner attacks a guilty plea have not involved the problem of abuse of the writ, we are impressed by the fact that a hearing is nevertheless often required in this context where a trial judge has first-hand and extensive knowledge of the facts. In the context of a question of abuse of the writ, where concerns of finality are not so strong, there very well may be more

motion attacking a guilty plea, we have held that ordinarily a defendant will not be heard to refute testimony given under oath when pleading guilty. *United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979). Nevertheless, in this circuit, as well as in the Supreme Court, when a § 2255 petitioner sets out detailed factual allegations regarding alleged circumstances which may go to the voluntariness of his plea, the petitioner is entitled to a hearing unless the motion and the files on record conclusively show the petitioner is entitled to no relief. *Fontaine v. United States*, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973); *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); *United States v. McCord*, 618 F.2d 389 (5th Cir. 1980); *United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979); *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1975); *cf. McKenzie v. Wainwright*, 632 F.2d 649 (5th Cir., 1980) and *Bryan v. United States*, 492 F.2d 775 (5th Cir.), *cert. denied* 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974). Typically, this circuit has found some form of corroboration to a petitioner's allegations before requiring a hearing. *United States v. McCord, supra; United States v. Sanderson, supra; Dugan v. United States, supra.*

As in both *Sanders* and the analogous cases involving attacks on guilty pleas, Potts has alleged matters which cannot be concluded from the record. Although Potts at one point in the June 10 hearing denied coercion as a factor in his dismissal of his first petitions, he is now alleging harassment by prison authorities, a matter upon which the record is silent. The record does not show what family pressures may have affected Potts, other than his

---

reason to give the petitioner a hearing to attack the voluntariness of any act relevant to the abuse question.

allegation in his brief that his mother told him he was wrong in pursuing an appeal. Nor have we any indication of the medical treatment he has received while in prison or the treatment he could expect should his death penalties be overturned. Nothing Potts said in the June 10 hearing addressed these allegations, and an evidentiary hearing will be necessary if they are to be substantiated or refuted.

We also believe that there is some corroboration of Potts' allegations of harassment from prison authorities in his June 10 hearing.[32] When asked specifically whether he was abandoning his claims because of certain actions by prison authorities, Potts acknowledged that "some things did happen" and he requested the court's help to make sure they would not happen again, but insisted that he was dismissing his petitions because they had been filed only to console his brother. (Tr., June 10, 1980, pp. 35-36).

Because the district court erroneously relied on evidence adduced in a case to which Potts was not a party, and because Potts has alleged facts—relevant to the issue of voluntariness and raising issues outside the record and not resolvable through the personal knowledge of the district judge—which require an evidentiary hearing,[33] we

---

[32] While not providing clear corroboration of Potts' allegation of family discontent over his decision to file his first petition, the fact that Potts wrote his June 6 letter dismissing his first petition in the presence of his mother and has had frequent contact with his mother (Tr., June 10, 1980, hearing, p. 26), and wished to consult with family members before filing his second petition, provides some credibility to his allegation of family pressure.

[33] As we noted above in note 27, Potts and other witnesses were present in the courtroom on June 26 and were prepared to testify concerning the voluntariness of Potts' abandonment. Because of the seriousness of the sentence Potts was attacking and because it would have inconvenienced the district court only slightly to take evidence

remand to the district court for an evidentiary hearing on whether Potts' abandonment of his federal habeas corpus rights was voluntary.[34]

ENDS OF JUSTICE

[8] Although we have focused our attention on the proper considerations for a determination of an abuse of the writ, we are cognizant of the requirement in *Sanders* that even if a successive petition could otherwise be dismissed without consideration on the merits, the ends of justice may nevertheless induce—and may even require—the district judge to exercise his discretion to address the merits. *Sanders v. United States*, 373 U.S. at 18-19, 83 S.Ct. at 1078-79. There are weighty factors in the instant case, in addition to those we have considered with respect to abuse, which are relevant as to whether the ends of justice would be served by addressing Potts' second petition. The fact that a man's life is at stake is relevant. Also relevant is the fact that Potts would be executed without ever having had any federal review of the merits of the alleged constitutional defects in his conviction and sentence. The district judge may weigh these consequences against the degree of fault or misconduct which he might find on remand. Also relevant is any possible prejudice to the state, *e. g.*, whether the state has lost important transcripts or witnesses necessary to rebut Potts' substantive claims. We express no opinion with respect to whether the ends of justice require the district

on this issue during the June 26 hearing, there was much less reason for the court in this case to rely solely on Potts' sworn testimony of June 10.

[34] Although it may be the case that the evidence developed at the evidentiary hearing is insufficient to demonstrate an involuntary abandonment, the same evidence nevertheless may be relevant on the issue of abuse and whether some reason justifying Potts' action exists.

court to address Potts' second petitions, preferring that the district court on remand address the question in the first instance, if necessary.

CONCLUSION

We conclude that a remand for an evidentiary hearing is necessary with respect to Potts' second set of petitions, numbered 80-7476 and 80-7477 in this court. Although we reject Potts' argument based on Fed.R.Civ.P. 41(a), we agree that Potts' intentional abandonment does not, by itself, constitute an abuse of the writ of habeas corpus. Rather, Potts' actions must be tested against the equitable principles which we have deduced from prior cases, primarily *Sanders v. United States*, *supra*, and *Fay v. Noia*, *supra*. The district court on remand shall hold an evidentiary hearing on the abuse issue generally and on the sub-issue involving voluntariness, shall make findings of fact and conclusions of law—applying the applicable equitable principles to the totality of the facts and circumstances. Finally, the district court shall, if necessary, address the ends of justice issue.

With respect to the appeal of his first two petitions, numbered 80-7664 and 80-7665 in this court, Potts applied to this court for a certificate of probable cause only as a precautionary measure should the dismissal of the first petitions be deemed anything other than a voluntary dismissal under Fed.R.Civ.P. 41(a). No briefs have been filed with respect to those appeals, but instead Potts' attorneys evidently informed the clerk of this court of their intention to file a motion to adopt the briefs in numbers 80-7476 and 80-7477, and of the likelihood of their filing supplemental briefs. No such supplemental briefs have been filed. Considering the briefs in 80-7476

and 80-7477, appealing the dismissal of the second petitions, the only possible assertion of error in 80-7664 and 80-7665 relates to the issue of whether Potts' abandonment of his first petition was voluntary. We note that this issue will be determined when the district court considers the second petition on remand. If Potts is successful, he will have a determination on the merits of all the claims raised in the first petition. Therefore, this issue provides no need to prolong the life of the first petition. We note also that Potts expressly does not argue, either in brief or at oral argument, that he was incompetent at the time he dismissed his first petition, and thus incapable of abandoning it. Seeing no error, we affirm the district court's dismissal of the petitions in 80-7664 and 80-7665.

With respect to docket numbers 80-7664 and 80-7665, AFFIRMED.

With respect to docket numbers 80-7476 and 80-7477, VACATED AND REMANDED.

LEWIS R. MORGAN, Circuit Judge, dissenting.

I dissent from the majority opinion vacating the district court's order dismissing the appellant's petitions. I would affirm the order of the district court. The court below found there was an intentional, knowing and unequivocal relinquishment of a known right which constituted a waiver of federal habeas corpus review. Under the evidence, that there was a waiver and an abandonment is established beyond any doubt. Seeking another stay and consideration of substantively identical successive petitions constitutes an abuse of the writ as defined by *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148. I agree with the district court order that there must be an end to litigation and that such frustration of the legal processes should not be allowed to continue.

THOMAS A. CLARK, Circuit Judge, specially concuring:

I concur.

I agree with and concur in Judge Anderson's scholarly and thoughtful opinion. I think that the remand provided for in his opinion is the least that is required under the circumstances; I would go further and require a hearing on the merits because I believe the facts and the ends of justice overwhelmingly compel the granting of a habeas corpus hearing on the merits. I would therefore hold that it is unnecessary to conduct a hearing in order to determine whether a later hearing on the merits of Potts' constitutional claims should be had.

We are balancing (1) the right of a prisonr to a habeas corpus hearing one month after he waived such a right, against (2) the possibility that the state might have suffered substantial prejudice if the hearing were granted, and (3) the district court's being vexed or harassed in the performance of its functions or the prisoner's obtaining a delay of his death sentence.

Judge Anderson has forcefully elucidated the preeminence of habeas corpus in our country's criminal law procedure. Here the prisoner is sentenced to die; he has not had a federal habeas corpus hearing; the record clearly reflects a tortured and vacillating mental state that has bent to differing pressures from his brother, his mother, his attorneys, and the news media, not to consider the alleged maltreatment in prison about which no evidence has been taken in the instant case. One cannot truly be surprised that the prisoner at one time wanted to hurry his own execution and at another time wanted to live and seek relief for claimed deprivation of constitutional rights.

I read the holding in *Sanders* to require an express finding that Potts had the specific intent to vex, harass, or delay in withdrawing the first petition before he could be denied a hearing on the second petition. I see no evidence of such intent in the record that has been made up to this time.

Alternatively, I can only conclude that the ends of justice demand a hearing on the second petition. Assuming no prejudice to the state, we have on the one hand the possibility of intent to vex, harass, and delay—on the other, death by electrocution without determining if the prisoner was deprived of his rights. The ends of justice require that the district court fully consider the prisoner's constitutional claim under these extreme circumstances. To do otherwise would always leave unanswered the questions—Did Potts intend to vex, harass, and delay? Was Potts deprived of any of his federal constitutional rights? Was it appropriate to take his life by answering the first question yes and avoiding an answer to the latter question? The price of granting a full hearing is to small when balancing these considerations.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK HOWARD POTTS, VS SAM AUSTIN, Warden, Georgia State Prison.	CIVIL ACTION NO. C80- 964A

JUDGMENT

The Court, Honorable William C. O'Kelly United States District Judge, by order of this date, having dismissing petition of habeas corpus.

JUDGMENT is hereby entered in favor of the respondent(s) and against the petitioner(s).

Dated at Atlanta, Georgia, this 13th day of June, 1980.

BEN H. CARTER, CLERK

BY: /s/ CLAUDIA PHILLIPS
DEPUTY CLERK

Filed and entered in
Clerk's Office this
13th day of June, 1980
BEN H. CARTER, CLERK

BY: /s/ CLAUDIA PHILLIPS
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
and
GAINESVILLE DIVISION

[Filed in Clerk's Office, June 13, 1980, Ben H. Carter, Clerk, By: /s/ J. W. E., Deputy Clerk]

JACK HOWARD POTTS, vs. SAM AUSTIN, Warden, Georgia State Prison.	CIVIL NO. C80-964A
JACK HOWARD POTTS, vs. SAM AUSTIN, Warden, Georgia State Prison.	CIVIL NO. C80-46G

ORDER

This is the life or death saga of a convicted murderer on death row. Over the past week these actions have steered a bizarre course, and now as a result of petitioner's actions, this pen writes of Jack Howard Potts probably for the last time.

Jack Howard Potts was arrested, tried, and convicted of heinous and despicable crimes against society. He was tried for separate crimes in Cobb and Forsyth Counties for what has been generally described as a "crime spree" which took place in 1975. Before he was apprehended, two persons were shot and one was killed, having been kidnapped and shot in the head at point blank range. Petitioner was tried and convicted in Cobb County, Georgia, for kidnapping, armed robbery, and aggravated assault. Approximately six months later he was convicted in Forsyth County, Georgia, of premediated murder. He was sentenced to death on the convictions for murder,

kidnapping, and armed robbery. Petitioner's trial attorneys appealed those convications as a matter of right to the Supreme Court of Georgia, which affirmed each of the convictions and the sentences of death as imposed for the kidnapping and murder convictions. *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978). The court reversed the sentence of death as to the armed robbery conviction. *Id.* at 88; 243 S.E.2d at 525. For reasons that are not entirely clear, petitioner's attorneys did not petition for the issuance of a writ of certiorari to the Supreme Court of the United States. Having exhausted or otherwise foregone direct appellate review of his convictions, petitioner, through counsel, initiated a habeas corpus action in the state courts. A hearing was conducted on that action in the Superior Court of Tattnall County, and Mr. Potts was denied relief. That decision was then appealed to the Supreme Court of Georgia. While that appeal was pending before that court, Jack Potts, as he testified before this court, decided to dismiss his attorneys and withdraw his pending appeal. The petitioner testified that in November of 1979, December of 1979, and January of 1980, he requested by letter that the Supreme Court of Georgia dismiss his appeal. Apparently disregarding petitioner's request, the Supreme Court ruled on the application on January 8, 1980, denying petitioner's application for a certificate of probable cause for habeas corpus appeal and granting a motion to discharge the attorneys. From petitioner's testimony it was by his desire that the attorneys were dismissed, and, until June 4, 1980, petitioner insisted that sentence be imposed.

The story of Jack Howard Potts began to unfold in this court on Tuesday, June 3, 1980. Late in the afternoon of that day the clerk notified the court that separate

habeas corpus actions had been filed by a "next friend" and that those actions had been assigned to this judge.[1] A review of the actions indicated that the petitioner was contending that Jack Howard Potts was incompetent to waive his right to federal habeas corpus review. Also presented to the court in those actions were applications to stay execution pending full habeas corpus review. As Mr. Potts' execution was scheduled for June 5, the court immediately summoned petitioner's attorneys and representatives of the Georgia Attorney General's office. After conferring with counsel, the court scheduled a hearing to commence at 7:30 a.m. on June 4, 1980, to determine whether the petitioner was an appropriate "next friend" and, if so, whether Jack Potts was competent to make a knowing and intelligent relinquishment of a known right. *See Gilmore v. Utah*, 429 U.S. 1012 (1976). That hearing consumed most of the day of June 4. After hearing the testimony, including expert testimony of a psychologist, reviewing the documentary evidence, and viewing a videotape of a press conference held by Mr. Potts on June 2, 1980, the court determined that there was not a proper "next friend" before the court and that, even if there was, the evidence not only failed to raise an issue as to competence but showed beyond a reasonable doubt that Mr. Potts was competent. Pursuant to those determinations, the court denied the applications for a stay of execution and dismissed the actions as failing to state a claim.[2]

---

[1] Case number C80-964A was filed on June 3, 1980, in the Atlanta division of this court. It was assigned to this judge on rotation assignment. Case number C80-46G was filed one day later in the Gainesville division of the court. That case was automatically assigned to this judge, who handles all cases in that division.

[2] The original petitioner was the Reverend Murphy Davis, a Presbyterian minister, who had had limited contact with petitioner. At

The court's ruling was made at approximately 6:15 p.m.[3] At approximately 7:15 p.m. on that same evening, some 15 hours before the scheduled execution, the court received notice by telephone that Jack Howard Potts had signed an authorization at the Georgia State Prison at Reidsville for Millard Farmer, Andrea Young, and Joe Nursey to act as his attorneys and to bring a federal habeas corpus action attacking the constitutionality of his state court convictions. Mr. Nursey was in Atlanta and had previously prepared separate actions and applications for a stay of execution with Mr. Potts as petitioner. After the office of the Attorney General contacted the warden at Reidsville and confirmed to the court that Mr. Potts had, indeed, authorized the actions, Mr. Nursey was allowed to file those pleadings with the deputy clerk in chambers. As Jack Howard Potts had not previously exercised his right to federal habeas corpus review, the court granted his application for a stay of execution and determined that the petitions should be

---

the hearing Leonard Potts, Jack Howard Potts' first cousin, was added as an additional petitioner. The evidence showed that Leonard Potts had not seen Jack Howard Potts in over a year and had spoken to him on only one occasion. The court found that neither Rev. Davis nor Leonard Potts had standing as "next friends." Late in the day as the hearing was drawing to a close, counsel notified the court that Jack Howard Potts' brother, John Potts, who had been with him most of the day, wished to join the suit as an additional next friend petitioner. Because it appeared likely from counsel's representations that John Potts would be an appropriate next friend and because of the gravity of the situation, the court made a determination on the merits of Jack Howard Potts' competency even though John Potts never appeared in the actions. Those proceedings are the subject of the court's order of June 6, 1980. *Davis v. Austin*, Case Nos. C80-954A and C80-45G.

[3] At about 7:00 p.m. the court received notification from the clerk of the Fifth Circuit Court of Appeals that an emergency panel had denied a stay pending appeal to that court as well as a stay pending application for relief to the Supreme Court of the United States.

submitted to the magistrate for a report and recommendation and proceed as any other habeas corpus petition in this court.[4] The stay was communicated to the state officials, and the sentence was not carried out as scheduled.

The court then returned to the trial of another criminal matter which had been interrupted by the emergency petitions on Mr. Potts' behalf. That trial proceeded without incident on Thursday and Friday. After court had adjourned on Friday, one of the court's law clerks received a telephone call from a person identifying herself as Carolyn Potts, the mother of Jack Howard Potts. She indicated that she had a letter signed by her son on that day, witnessed by her, and addressed to the court, which indicated that her son did not wish to be represented by Millard Farmer and desired to withdraw his habeas corpus petitions. Because Mrs. Potts was several hours away from the courthouse, en route from the Georgia State Prison, the court made arrangements for someone to be present to receive the letter at the courthouse. The letter was received at approximately 6:30 p.m., and the court was informed of its contents. The letter is attached as Appendix "A." On Monday morning the court concluded the evidence in the other criminal matter and when the jury retired to deliberate, the court summoned Mr. Potts' attorneys and representatives of the Attorney General's office for a conference.[5]

---

[4] *See Potts v. Austin*, Case Nos. C80-964A and C80-46G (orders of June 4, 1980). The court was in the process of preparing orders for the respondent to show cause why the writ should not issue. Subsequent events obviated the necessity of those orders.

[5] A representative of petitioner's attorneys notified the court on Monday morning that they were aware of the letter sent to the court by their client. It was also represented that petitioner's attorneys had spent a large portion of the weekend attempting to convince

Neither the court nor counsel was aware of any precedent directly addressing the situation. For that reason the court proposed to counsel a procedure to determine whether or not Mr. Potts' petitions would be withdrawn as his letter requested. The court first determined that it would not act in any way to petitioner's prejudice on the letter received from petitioner's mother. The letter, standing alone, was clearly insufficient as a basis for dismissal of petitioner's action where such a step would, in all likelihood, result in petitioner's execution. The court proposed to order the issuance of a writ of habeas corpus ad testificandum for petitioner to appear before the court on Tuesady morning, June 10, 1980. At that time the court proposed to address the petitioner personally and in open court, in a manner analogous to that required for acceptance of a plea of guilty under rule 11 of the Federal Rules of Criminal Procedure. After much reflection over the weekend, the court concluded that a procedure which would be sufficient for a finding that a plea of guilty to premeditated murder was freely and knowingly entered into would lend itself well to the court's determination of whether Jack Howard Potts understood the consequences of his request, whether he was acting freely, and whether he genuinely desired to withdraw his action. The court proposed then to propound a series of questions to Mr. Potts and elicit a narrative response from him in order to ensure that he was competent and understood fully the

---

him to continue with the habeas corpus actions and their representation of him. Mr. Farmer confirmed that he and his associates had spent many hours with Mr. Potts over the weekend and were continuing to explore other avenues in order to persuade him not to abandon these petitions. Because counsel for petitioner had knowledge of petitioner's letter asking that his petitions be withdrawn, the court, in the interest of equal treatment, apprised the Attorney General's office of the situation.

finality of a decision to withdraw his petitions. All counsel concurred in the court's approach.

Although the court had found only six days before that there was no evidence even raising the issue of petitioner's competence to make a knowing and rational decision, the court also proposed that a court-appointed pyschiatrist be present at the hearing for the purpose of rendering his opinion as to Mr. Potts' competency at the time of the hearing. Counsel also agreed with the court's proposal in that regard. The assistant Attorney General agreed that the state would bear that expense. The court contacted Dr. William S. Davis, who agreed to be present at such a hearing. Dr. Davis was selected as he had testified before the court on several prior occasions, and the court recalled that he was extremely well qualified as an expert in psychiatry. Other than having heard him testify, the court had no previous contact with Dr. Davis. Having received the endorsement of counsel on the procedure proposed, the court directed that Mr. Potts be brought to Atlanta for a hearing to commence at 11:00 a.m. on the following day. Because Mr. Potts had expressed in his letter that he would thereafter refuse the help of Millard Farmer and Andrea Young and desired not to talk with them further, Mr. Farmer and Miss Young as well as Mr. Nursey agreed that they should not act as counsel at the hearing but that the court should conduct the proceedings.

At 11:00 a.m. on June 10, 1980, the court commenced the hearing by advising petitioner that his attorneys of record had not been relieved by the court and that he had a right to be represented at the hearing by counsel of record or another attorney. Petitioner indicated that he did not desire his attorneys of record or any other at-

torney to represent him. Mr. Potts then took the witness stand and was sworn. The court began by reading to Mr. Potts its order entered June 9, 1980, scheduling the hearing and directing that a writ of habeas corpus ad testificandum issue in order to ensure that he knew the purpose of the hearing. Mr. Potts then confirmed that he had written a letter to the court; the court then read the letter it had received. Petitioner confirmed that the letter was written as received by the court. The court asked Mr. Potts if he understood the consequences of his requests and whether he persisted in those requests. Upon receiving an affirmative response, the court asked Mr. Potts why he persisted in his request to withdraw his habeas corpus petitions. Mr. Potts responded, stating,

> I was tried by a jury of twelve men and women. I've been found guilty of murder, a murder I committed. I could argue the constitutional laws that may have been overlooked or misused or whatever. But I see no sense in going along further and further, year after year, and probably end up dying in the electric chair anyway. I did not want to change my mind this past Thursday but as I said in the letter, it would have been very hard on my brother to see me die and thinking he could have done something else for me. So, now that he can leave it at that, you know, he did what he could do, and now he will be satisfied, I hope he can live with that.[6]

The court then indicated to Mr. Potts that it had viewed a videotape of a news conference held by him the previous week and asked Mr. Potts if he remembered that and whether his feelings were the same. Mr. Potts indicated only that he was now expressing his thoughts in

---

[6] The court had previously warned Mr. Potts that he retained his rights under the fifth amendment to the Constitution and that he did not have to make any statements which might tend to incriminate him.

a different way. He stated that his life had changed over the last few years, that he had asked God to forgive him, that he knew he was forgiven, and that he no longer had to answer to anyone.

The court next asked petitioner if he was in any way threatened or coerced to withdraw his action. Mr. Potts stated that no one had talked to him about withdrawing the petitions and that he had made the decision on his own. The court continued its inquiry, asking petitioner if force had been used against him or if his life had been made such that continued existence would be difficult. Petitioner again indicated that the decision was his. Upon questioning, petitioner indicated that he was not under any type of medication and had not been for several days.

Petitioner was then asked if he realized that if he withdrew the petitions, he would be immediately resentenced and that sentence would be imposed within ten to twenty days of the date of resentencing. Mr. Potts answered in the affirmative.

The court elicited a narrative response from petitioner concerning the history of his criminal convictions. Mr. Potts demonstrated a lucid recollection of the trial proceedings, his attorneys, the time periods involved, and the habeas corpus proceedings in the state courts. He answered the questions propounded to him candidly, openly, and without hesitation. He appeared reasonable and rational at all times and knowledgeable about prior court proceedings.[7] Mr. Potts indicated that he had read

[7] Mr. Potts indicated that his direct appeals were taken before the Supreme Court of the United States on an application for a writ of certiorari. Counsel informed the court that such an application was not properly made. The court later informed petitioner that it appeared that the Supreme Court had not reviewed his case. Overall, however, petitioner's understanding of the processes was detailed and complete.

the petitions filed by his attorneys and was familiar with the grounds raised. Mr. Potts then stated that he had decided sometime in November that he would seek no further judicial review. He indicated that many persons, both attorneys and non-attorneys, had attempted to convince him to appeal, that he had been harassed, and that although he understood people did not want him to die, he wished they would leave him in peace.

The court then advised the petitioner that the action he was taking would amount to an abandonment of claims in the federal courts of certain constitutional violations and that a dismissal of these petitions would be an abandonment of the last available avenue of attack of the convictions and sentences of death. Mr. Potts responded, "I am well aware of that." He also indicated that he had no questions concerning the petitions or the effect of the withdrawal or abandonment of the petitions. The court asked Mr. Potts once more whether it was still his desire to dismiss Millard Farmer, Andrea Young, and Joe Nursey as counsel in these actions and withdraw these habeas corpus petitions. The court then stated,

> You realize that if I dismiss those then you have nothing from which to appeal to the Court of Appeals for the Fifth Circuit or the United States Supreme Court? Do you realize that the consequences of that would be that you would be remanded to the state prison for resentencing by the two superior courts involved?

Mr. Potts responded that he understood. The court then asked Mr. Farmer if he had any suggestions for further questioning. At Mr. Farmer's request, the court again informed Mr. Potts that he could talk to his attorneys of record or another attorney and asked Mr. Potts if he desired to talk with any of his family members.

Mr. Potts stated that nothing further needed to be done prior to the court's decision. The attorneys for the state had no additional suggestions.

The court then requested that Dr. Davis take the stand. The court inquired whether Dr. Davis had observed Mr. Potts for a sufficient period of time upon which to base an opinion as to whether he was competent to make a knowing and intelligent decision on that day. Dr. Davis stated that he had had a sufficient opportunity to observe petitioner and that it was his professional opinion that petitioner understood the nature of the proceedings and the consequences of his decision. Dr. Davis stated that he saw nothing at all which would warrant further inquiry into the subject matter of petitioner's competency at that time.

The court then took a fifteen minute recess before ruling. During that recess Mr. Farmer suggested two additional subjects of inquiry to the court. In order to probe every possible avenue to ensure that Mr. Potts was in fact freely and voluntarily making a knowing decision, the court, upon reconvening the hearing, addressed the subjects of Mr. Farmer's concern to petitioner. The court first asked petitioner if the destruction of some of his personal religious objects at the Georgia State Prison or any treatment he had received at that institution after the filing of these petitions had a bearing on or contributed to his determination to withdraw the petitions. Mr. Potts stated that those factors did not influence his decision. The court then asked petitioner if he had told anyone that the reason he was abandoning these cases was because of actions taken against him by prison personnel. He stated he had not. Finally, the court stated that it appeared that his direct appeal was not taken before the

Supreme Court of the United States as petitioner had earlier stated. Petitioner stated that it did not make any difference at all as far as his present decision was concerned.

After hearing Mr. Potts testify, the court found, as it did in the earlier proceeding, that he was fully competent to make the decision to abandon further legal proceedings. For that reason the court granted petitioner's request that counsel be relieved and directed that their names be stricken as counsel of record. The court then, at petitioner's request, dissolved the stay of execution entered June 4, 1980. As petitioner's requests are clear and are not the product of mental incompetency or coercion, the court will grant them. Accordingly, the petitions for writ of habeas corpus in the captioned cases are hereby dismissed.

IT IS SO ORDERED this 13th day of June, 1980.

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

[Received in Chambers, June 6, 1980,
Judge William C. O'Kelley]

Dear Judge O Kelly

Sir i wrote a note to you requesting to appeal and you granted a stay, at the time i asked for the new appeals i was with my brother, the only reason i asked for the appeal was to satisy my brother who i love very much. Judge, i had no idea the stay would be granted, i knew you had refused a last friend appeal, so i truly thought that by writing the note in my brother presence the only thing it would accomplish would be to set his mind at ease, so he (my brother) could know without a doubt he had done all he could do for me. Judge O Kelly i am asking you to let me, (if its my right) withdraw the appeal. I realize Millard Farmer will only continue to use me and my situation if you fail to help me now. I beg of you to please let me withdraw this appeal as quickly as possible!

Let me get a date set immediately and most of all let me die while in a state of grace! And could you issue an order that i refuse to see any reporters or news people. Judge O Kelly i am giving this letter to my mother who will forward it to you today 6/6/80. I assure you Judge i am sound of mind and body, but i must be able to withdraw the appeal and i do now, as of today refuse the help of Millard Farmer and Andrea Young. and i refuse to speak with them. God Bless you Judge for you kind and considerate cooperation.

/s/ Jack H. Potts
69124-4th Floor
Reidsville, Ga.
6/6/80
June 6, 1980

Witnessed:
Mrs. Carolyn Potts (Mother) June 6, 1980

APPENDIX "A"

(1) No reporters to be let in to Reidsville to see me.

(2) No moving me back and forth from Reidsville Prison to Jackson Prison.

(3) An immediate date to be set so the circus atmosphere will not have the chance to begin.

(4) Please accept my apology for having caused you problems in this, Judge.

(5) Every thing is prepared here at Reidsville for an execution if an immediate date is set.

/s/ Jack H. Potts

6/6/80

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK HOWARD POTTS, vs. WALTER ZANT, Warden, Georgia Diagnostic and Classification Center.	Civil Action No. C80-1078A

JUDGMENT

The Court, Honorable William C. O'Kelley United States District Judge, by order of this date, having dismissed the petition and denied the stay of execution.

JUDGMENT is hereby entered in favor of the respondent(s) and against the petitioner(s).

Dated at Atlanta, Georgia, this 26th day of June, 1980.

BEN H. CARTER, CLERK

By: /s/ SHEILA SEWELL
SHEILA SEWELL
DEPUTY CLERK

Filed and entered in
Clerk's Office this
June 26, 1980
BEN H. CARTER, CLERK

By: /s/ SHEILA SEWELL
SHEILA SEWELL
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
and
GAINESVILLE DIVISION

[Filed in Clerk's Office, June 26, 1980, Ben H. Carter, Clerk, By: /s/ J. W. E., Deputy Clerk]

JACK HOWARD POTTS, vs. WALTER ZANT, Warden, Georgia Diagnostic and Classification Center.	CIVIL NOS. C80-1078A and C80-50G

ORDER

Once again the court is faced with eleventh hour petitions filed by Jack Howard Potts, seeking a stay of his execution presently scheduled for July 1, 1980. The court first entertained habeas corpus petitions by Mr. Potts on June 4, 1980, less than one day before his execution in the electric chair was to take place.[1] At that time separate petitions attacking Mr. Potts' convictions in Cobb and Forsyth Counties, Georgia, were filed. As Mr. Potts had not theretofore applied for habeas corpus relief in the federal courts, a stay of execution was entered, and the court directed that the actions proceed as any other such actions in this court. A few days later the court received a letter from Jack Potts indicating that he desired to withdraw his habeas corpus petitions and have his execution date immediately rescheduled. Because of the potential finality of Mr. Potts' requests and to ensure that Mr.

[1] Moments prior to the filing of the petitions by Mr. Potts, the court denied petitions filed by purported "next friends" of Mr. Potts. *Davis v. Austin*, Nos. C80-954A and C80-45G (orders of June 6, 1980).

Potts' decision to abandon further legal action was made knowingly and intelligently, the court conducted a hearing on June 10, 1980, to determine if Mr. Potts had made a competent decision to abandon his right to federal habeas corpus review.[2] The court determined that petitioner was competent at that time and did desire to abandon his petitions so that a new execution date could be immediately set. The court granted Mr. Potts' request, dismissed his petitions, and judgment was entered for respondent. On June 17, 1980, the superior courts rescheduled Mr. Potts' execution for July 1. Although the procedure utilized by the court at the June 10 hearing was clearly formulated to provide a final decision by Mr. Potts on whether he desired federal habeas corpus review, the court had not heard the last from Mr. Potts.

On the afternoon of June 25, 1980, the court received a telephone call from Mr. Joe Nursey, who was counsel of record in the previously dismissed petitions, indicating that he had petitions for writs of habeas corpus signed by Mr. Potts. Because only a few days remained before the scheduled execution, the court requested that Mr. Nursey deliver the pleadings to Gainesville, Georgia, where the court was holding a lengthy civil trial. Upon arriving, Mr. Nursey indicated that he had unintentionally mislead the court in that he was not authorized to file the actions until the following morning so that Mr. Potts could contact a family member prior to that time. The court indicated to Mr. Nursey in no uncertain terms that time was precious, that the court was extremely busy, and that such trifling was not to be countenanced. Mr. Nursey determined to file the actions immediately.

[2] The transcript of that proceeding is attached as appendix "A." The dismissal was the subject of the court's order of June 13, 1980. *Potts v. Austin*, Nos. C80-964A and C80-46G.

The petitions presently before the court are substantively identical to the petitions filed by Mr. Potts on June 4, 1980, in that they raise the same grounds previously raised.

The court determined to hear from counsel for both Mr. Potts and respondent on the following morning to determine whether the subsequent actions would be entertained and another stay granted.[3] Counsel for the State telephoned the warden of the Georgia Diagnostic and Classification Center where Mr. Potts was being held to determine if Mr. Potts had authorized the filing of the petitions and to determine the availability of Mr. Potts should his presence become necessary. After talking to Mr. Potts, the warden indicated to the court and counsel for both sides, who were on extension telephones, that Mr. Potts had denied authorizing the petitions. Faced again with Mr. Potts' conflicting actions, the court determined that his presence would be necessary at the hearing the next morning. The court directed counsel to be prepared to address the question of whether the court should entertain these petitions in the face of Mr. Potts' prior actions.

The hearing commenced at 9:30 a.m. on June 26, 1980, with Mr. Potts present. The court began by summarizing the purpose of the hearing and then asked Mr. Potts if he desired to be represented by an attorney at the hearing. Mr. Potts indicated that he desired Tom West and Ralph Goldberg to represent him.[4] Both Mr. West and Mr. Goldberg were located in the courthouse, and the court recessed to allow Mr. Potts an opportunity to confer in

---

[3] Mr. Nursey filed the papers for Mr. Potts, who desired at that time to proceed pro se with Joe Nursey, Millard Farmer, and Andrea Young acting as "standby counsel."

[4] Mr. Nursey was present and available to assist Mr. Potts.

private with counsel. After approximately thirty minutes, the hearing was reconvened. The court first asked Mr. Potts if he had conferred with counsel. He indicated he had and that he wished Mr. West and Mr. Goldberg to represent him at the hearing. Mr. West subsequently indicated that Mr. Potts desired Mr. Nursey's assistance at that time also. The court then asked Mr. Potts personally if the petitions filed by Mr. Nursey on the previous afternoon were his petitions and if he desired to pursue them. Mr. Potts answered affirmatively. Having determined that Mr. Potts did desire to have these additional petitions entertained and a stay granted, the court allowed counsel to present argument as to whether the ends of justice would be served by the entertainment of these actions and whether there had been an "abuse of the writ."

The seminal case concerning the trial court's equitable power to control the use of the right to habeas corpus review is *Sanders v. United States*, 373 U.S. 1 (1963). In that case the Court addressed the question of when the bringing of successive habeas corpus petitions could constitute an abuse of the writ. *Id.* at 17.[5] Mr. Justice Brennan, writing for the Court, stated that an abuse of the writ would be present if a petitioner deliberately withholds one of two grounds for relief in his first application so that he might receive a second hearing. The Court held that in such a situation the petitioner "may be deemed to have waived his right to a hearing on the second ground." *Id.* at 18. The Court then continued, stating that such a waiver may also be present.

---

[5] Rule 9(b) of the rules following 28 U.S.C. § 2254 was a codification of the rule set down in *Sanders v. United States*, 373 U.S. 1 (1963). The specific language of rule 9(b) is not applicable to the situation at hand.

> if . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Id. at 18.

The continued vitality of *Sanders* is demonstrated by the recent decision in *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980). Although the court determined that no abuse of the writ was presented by that case, it reaffirmed the requirement that where there has been " 'an intentional relinquishment or abandonment of a known right or privilege,' " which a petitioner subsequently attempts to raise, an abuse of the writ is present. *Id.* at 1006, *quoting Fay v. Noia*, 372 U.S. 391, 439 (1963).

From the evidence presented in the "next friend" actions brought on Mr. Potts' behalf and in the proceedings concerning Mr. Potts' prior petitions, the court is compelled to find that there was an intentional, knowing, and unequivocal relinquishment of a known right which constituted a waiver of federal habeas corpus review. Although no case with which this court is familiar involves a situation which is factually analogous, the court can see no valid justification for applying a different standard concerning waiver.

That there was a waiver and an abandonment is established beyond a cavil. There is not a shread of doubt or a grain of uncertainty that the petitioner understood the finality of his actions; that this is a death case is irrelevant to the court's finding, and although the consequences may be harsh, there must be an end to litigation. The evidence presented in the "next friend" petitions brought on Mr. Potts' behalf and in Mr. Potts' prior petitions clearly

revealed the scenario of the prior proceedings concerning Mr. Potts' convictions. After his convictions were automatically appealed under Georgia law, a state habeas corpus petition was filed, a hearing held, and relief denied. While the appeal of the state habeas corpus action was pending in the Georgia Supreme Court, Mr. Potts wrote a letter to that court requesting that his appeals be dismissed and that his attorneys be relieved. In spite of that request, the Georgia Supreme Court ruled, denying a certificate of probable cause for appeal. Petitioner also corresponded with the Governor of Georgia and the State Board of Pardons and Paroles, requesting that they take no action to delay his execution. Even though a number of persons, both attorneys and otherwise, attempted to convince Mr. Potts to renew legal efforts, he remained steadfast until the eve of his execution date. After staying the execution at the eleventh hour, the court had directed that Mr. Potts' petitions proceed through the normal course in this court. Only days later Mr. Potts again decided he desired no further court action. With knowledge of Mr. Potts' prior conduct, the court determined that such frustration of the process could not be allowed to continue and that a final decision by Mr. Potts on whether or not to continue litigation was necessary. To make it clear that Mr. Potts would have full knowledge of his right to review and of the finality of an abandonment of that right, the court devised a procedure analogous to that provided by rule 11 of the Federal Rules of Criminal Procedure. It was with the interest of finality in mind that the court endeavored in every manner it could devise to explain to Mr. Potts the time for a decision on whether to continue legal actions was at hand. The court endeavored to make the procedure as thorough as possible, leaving no stone unturned. Counsel of record for Mr. Potts expressly

concurred in the procedure utilized by the court, and before making a determination, the court broached additional areas suggested by counsel. If ever there is a situation where a finding of an intentional abandonment of a known right is demanded, this case presents it. By the same token, seeking another stay and consideration of substantively identical successive petitions constitutes an abuse of the writ as defined by *Sanders v. United States, supra.* Having brought Mr. Potts before the court on those petitions for no purpose other than to determine whether or not he desired federal habeas corpus review, and having determined that he wished to abandon that right, the court determined that the matter was final.

Counsel for petitioner contend that Mr. Potts' action concerning the prior petitions was nothing more than a voluntary dismissal without prejudice under rule 41(a). Assuming that rule 41(a) is applicable in habeas corpus actions, counsel's characterization is unfounded. A review of the court's lengthy colloquy with Mr. Potts on June 10 demonstrates that a final disposition of Mr. Potts' last available remedy was at issue. Mr. Potts' decision was not simply a voluntary dismissal without prejudice; it was a final abandonment of a known right to federal review of his state convictions and sentences of death.

It would appear from the language of the applicable statutory and case law that the trial court is allowed some discretion when considering successive petitions. *See* rule 9(b), 28 U.S.C. foll. 2254; *Sanders v. United States, supra.* In this case the clear and unequivocal actions of petitioner provide a clear basis, absent any other factors, on which to disallow these petitions. Here, however, the court's determination is buttressed by petitioner's statement under oath in the prior proceedings. After being

advised of his fifth amendment rights by the court, Mr. Potts volunteered that he had been found guilty by two juries of crimes which he had committed. Mr. Potts further stated that he was familiar with the grounds raised in his petition and felt that all he could do would be to delay the ultimate execution. Although there is no present requirement that a habeas corpus petitioner make even a colorable claim of innocence, *United States v. Blackburn*, 610 F.2d 253, 278 (5th Cir. 1970) (Ainsworth, J., dissenting), Mr. Potts' statements made in support of his request to abandon further review do provide cumulative support for a finding that the writ of habeas corpus has been abused.

For the above-stated reasons, the court finds that these petitions should not be maintained in this court. Accordingly, these actions are hereby dismissed, and the motions for stay of execution are hereby denied.

IT IS SO ORDERED this 26th day of June, 1980.

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

Nos. 80-7476
80-7477

[U.S. Court of Appeals, Filed March 23, 1981,
Gilbert F. Ganucheau, Clerk]

JACK HOWARD POTTS,
Petitioner-Appellant,

versus

WALTER ZANT, Warden,
Georgia Diagnostic and Classification Center,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion February 17, 1981, 5 Cir., 198__, ____ F.2d ____).

(March 23, 1981)

Before MORGAN, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be pooled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been pooled at the request of one or said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON

CLERKS NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK HOWARD POTTS,
Petitioner,
-vs-
SAM AUSTIN, Warden,
Georgia State Prisons,
Respondent.
} C-80-964-A

Transcript of proceedings before The Honorable WILLIAM C. O'KELLEY, United States District Judge, in Atlanta, Fulton County, Georgia, on Tuesday, June 10, 1980, in the above-styled action.

APPEARANCES OF COUNSEL:

For the Respondent:

MR. HARRISON KOHLER
MS. SUSAN BOLEYN
MR. JOHN WALDEN

INDEX

WITNESSES **PAGE**

JACK HOWARD POTTS
Examination by the Court..... 90
WILLIAM SIMMONS DAVIS
Examination by the Court.....109

(In Atlanta, Fulton County, Georgia; Tuesday, June 10, 1980, 11:10 o'clock a.m., in open court.)

THE COURT: Be seated, ladies and gentlemen.

Mr. Jack Howard Potts.

MR. POTTS: Yes.

THE COURT: Mr. Potts, I received a letter purportedly from you written last Friday and that is the purpose, as you may know, of this hearing today. Are you aware of that?

MR. POTTS: Yes.

THE COURT: First, it is the practice of this Court that those brought before it be afforded to be dressed in a dignified manner to appear before the Court and in clothes other than prison garb.

I note that you are in prison dress and the marshal indicated that they had clothing that could be afforded to you and I said if you wished to use it, even though it may not fit, to afford you that opportunity but if you elected to appear in prison garb, that was your choice. Is that your choice?

MR. POTTS: Yes.

THE COURT: All right, sir. Now, for the purpose of this hearing, you have the right to be represented by an attorney and you have in the cases pending in this court an attorney or attorneys of record. Do you desire to have them to represent you today?

MR. POTTS: No.

THE COURT: All right, you have a right to have an attorney to represent you and I will afford you an attorney and will assure that you are furnished an attorney

if you desire one. Do you understand you have the right to an attorney?

MR. POTTS: Yes.

THE COURT: Do you desire to have an attorney to represent you for this hearing today?

MR. POTTS: I do not wish to have an attorney.

THE COURT: All right, sir. Mr. Potts, the purpose of bringing you here is to determine a number of facts I feel that I need to determine. From that standpoint, it is the Court's determination because this hearing is, as far as I know, has no precedent in other cases or guide that the Court should follow, it has been the Court's determination that it would appear the principles of Rule 11 of the Federal Rules of Criminal Procedure and that I will treat this hearing in a fashion similar to a prisoner who was standing before me endeavoring to plead guilty to a criminal charge and follow the procedures that would be followed in that instance to try to determine the facts of the case.

This was discussed with the attorneys in this case in conference yesterday and I believe they each agreed that that probably was the best procedure.

I was looking—but I see Mr. Farmer is back there. I was looking at counsel table.

I will therefore ask that you be sworn and take the witness stand and I will, and not the attorneys, I will interrogate you concerning the letter and other matters of your understanding under oath.

All right, ask him to be sworn.

THE CLERK: Mr. Potts, come up to the witness chair, please. Raise your right hand.

You do solemnly swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

MR. POTTS: Yes.

THE CLERK: Be seated and state your full name for the record.

MR. POTTS: Jack Howard Potts.

JACK HOWARD POTTS,

called as a witness by the Court, being first duly sworn, testified as follows:

EXAMINATION

BY THE COURT:

Q Mr. Potts, do you understand the purpose of the hearing today?

A Yes.

Q Have you seen or received a copy of the order that the Court entered as of yesterday concerning a letter dated last Friday? Did you see the order I entered yesterday?

A No.

Q All right, let me read you that order. That order states as follows, that, "On June 4, 1980, the petitioner" — that is Jack Howard Potts — "in the captioned case" — and I must say there are two cases here, one in the Gainesville Division being a habeas corpus action filed attacking the conviction of Jack Howard Potts in the Superior Court of Forsyth County and one case in the Atlanta Division attacking the conviction of Jack Howard Potts in the Superior Court of Cobb County and this hearing today, of course, is in both of those cases. The order reads

essentially the same in both, that, "On June 4, 1980, the petitioner in the captioned case filed an application for writ of habeas corpus challenging his conviction and imposition of death penalty in the Superior Court of Cobb County, Georgia." And in the other order, in the Forsyth County, Georgia. "The Court, on the petitioner's motion, granted a stay of execution which was scheduled for Thursday, June 5, 1980."

"On June 6, 1980, the petitioner addressed a letter to the Court which was delivered to the Court by his mother. A copy of that letter is hereby filed as an attachment to this order. The letter requests that this action be withdrawn. In view of these unusual proceedings, the Court has summoned the attorneys for the petitioner and the attorneys for the State and it has been determined that a hearing should be held with the petitioner present so that the Court may determine his competence and whether or not his action in requesting the withdrawal of this action is freely and voluntarily given with full knowledge and understanding of the consequences of his action.

"It is hereby ordered that a hearing shall be held in Courtroom 1906 of the United States Courthouse, 75 Spring Street, S. W., Atlanta, Georgia, at 11:00 o'clock a.m. on Tuesday, June 10, 1980, and it is further ordered that a writ of habeas corpus ad testificandum shall be directed to the State of Georgia and/or the respondant herein to produce the petitioner, Jack Howard Potts, for said hearing."

That order was signed by me yesterday.

Do you understand it?

A Yes, sir.

Q Do you have any questions at all about that order

or the purpose of this hearing or what we are doing in this hearing today?

A No.

Q Did you in fact address a letter to me last Friday?

A Yes.

Q Did you deliver that letter to your mother to be delivered to me?

A Yes, I did.

Q I am going to read the letter which I received and ask you if that in fact is the letter that you wrote to me.

"Dear Judge O'Kelley: Sir, I wrote a note to you requesting to appeal and you granted a stay. At the time I asked for the new appeal, I was with my brother. The only reason I asked for the appeal was to satisfy my brother who I love very much. Judge, I had no idea the stay would be granted. I know you had refused a last friend appeal so I truly thought that by writing the note in my brother's presence, the only thing it would accomplish would be to set his mind at ease so he, my brother, could know without a doubt he had done all he could for me. Judge O'Kelley, I am asking you to let me if it is my right withdraw the appeal. I realize Millard Farmer will only continue to use me and my situation if you fail to help me now. I beg of you to please let me withdraw this appeal as quickly as possible. Let me get a date set immediately and most of all let me die while in a state of grace and could you issue or order that I refuse to see any reporter or news people? Judge O'Kelley, I am giving this letter to my mother who will forward it to you today, 6-6-80. I assure you, Judge, I am sound of mind and body but I must be able to withdraw the appeal and I do now as of today refuse the help of Millard Farmer and Andrea

Young and I refuse to speak with them. God bless you, Judge, for your kind and considerate cooperation."

It bears a signature, Jack H. Potts.

Is that the letter you wrote to me?

A Yes, sir.

Q Did you also attach a third page of requests to that letter?

A Yes, sir.

Q Of five items you requested?

A Yes, sir.

Q I will not read those at this time.

You signed that also?

A Yes, sir.

Q Do you understand the consequences or the nature of that request?

A Yes, sir, I do.

Q Do you still persist in that request?

A Yes.

Q Why do you persist in that request, Mr. Potts?

Let me—I had a note here and maybe I should at this time. I have asked a few questions of you thus far but if at any time I ask any question of you that would be self-incriminating, you have a right to refuse to answer that. Do you understand?

A Yes, sir.

Q I will not require you to answer any question that would be incriminating to you in the charges in regard to the cases which you have been convicted and you have a right under the Constitution to refuse to answer any

questions that would be incriminating to you. Do you understand that right?

A Yes, sir.

Q All right, sir. Then let's proceed.

Why do you wish to withdraw that request?

A I was tried by a jury of twelve men and women. I have been found guilty of murder, a murder I committed. I could argue the Constitutional laws that may have been overlooked or misused or whatever but I see no sense in going on further and further, year after year, and probably end up dying in the electric chair anyway.

I did not want to change my mind this past Thursday but, as I said in the letter, it's, it would have been very hard on my brother to see me die and thinking he could have done something else for me so now that he can leave it that, you know, he did what he could do and now he will be satisfied. I hope he can live with that.

Q In the hearing that I conducted in the cases, the other two cases that were filed by Reverend Murphy Davis last week, those were not filed with your consent, is that correct?

A No, I didn't give my consent.

Q All right, in that case or those cases, there were two of those, I viewed a video tape, news conference, held reportedly last Monday in State prison.

Do you remember that news conference?

A Yes.

Q Are your views as being expressed today the same as they were at that time?

A Yes. No, I'm not expressing them the same way.

There's been a big change in my life since a couple of years ago. I have asked God to forgive me for what I did and I think I have been—I know I have been forgiven for what I did and I don't have to answer to the people here on this earth for what I did.

Q Has anyone in any way threatened you to get you to withdraw—

A Definitely not.

Q —this appeal?

A No, sir, Judge.

Q Has anyone tried to coerce you into changing your mind?

A No one has said anything about would you do it or would you not do this. I have had people ask me would you not do it but no one has coerced me into doing this. I made this decision on my own.

Q Has anyone at all tried to get you to in any way withdraw your habeas corpus actions?

A No, no one has done that. This is my decision.

Q Has any force been used against you to get you to change or in any way make your life such that it would be more miserable for you if you didn't change your mind?

A Your Honor, when I asked, requested for this appeal, I knew that I, there would be some things that I would go through that any man would in prison because of just human feelings. Some poeple wanted me dead. Some wanted me alive but I made this decision and I'm asking the Court—and I did not do anything to make a mockery of the judicial system. I did it on the grounds like I told you in the letter. That's the only reason I did it. That's the only reason I asked for the appeal.

Q Are you under any form of medication at the present time?

A No.

Q When is the last time you took any form of medicine?

A Last Thursday at 10:00 o'clock.

Q You have had no medicine today?

A No.

Q Do you understand that if the Court grants your request and dismisses these appeals, that under Georgia law that you would immediately be resentenced and within ten to twenty days of that date, that sentence of the Court would be carried out?

A This is my wish.

Q You understand that is what—

A Yes, sir, I understand it. Perfectly clear.

Q Now, I mentioned earlier that there were two habeas corpus—well, first, let me recite with you the history of your case and make sure that I understand it and maybe you understand it as well.

As I understand your cases, you have been tried in two superior courts.

A Yes.

Q And in the Cobb County Superior Court, what were you convicted of?

A Kidnapping, aggravated assault and armed robbery.

Q And what were the sentence or sentences received there?

A I received death for kidnapping, death for armed robbery, ten years for aggravated assault. The armed robbery was overturned. The last ruling out of the U. S. Supreme Court said, with no violence during the process of committing a robbery, there can be no death sentence so they overturned that.

Q That was by the U. S. Supreme Court on appeal?

A Yes.

Q All right, and for what were you tried in the Forsyth Superior Court?

A Murder.

Q And the murder of whom?

A Michael Priest.

Q And what was the result of that case?

A Death.

Q Conviction of death?

A Conviction of death.

Q Which trial comes first?

A Cobb County.

Q What was the difference in the period of time between the two trials? Do you remember?

A Probably six to eight months. I'm not sure. Maybe less.

Q Were you represented by the same attorney in both cases?

A No. I was represtned by Barry Staples and Stephen Olah in Cobb County and Jess Watson and Dave Boling in Forsyth County.

Q Now, both of those convictions were appealed, is that correct?

A That's correct.

Q To what court?

A It was my understanding that I went back into the sentencing court. Then I went to the, probably State habeas, State court.

Q Did you have the opportunity to consult with your attorneys during the course of appeal?

A Yes.

Q The same attorneys who represented you at trial represented you on appeal?

Q Yes. Up until the Georgia Supreme Court. Then I believe that, or when the writ of certiorari was going into the Supreme Court, I think John Boger, NAACP, and—I don't know the other attorney's name out of New York.

Q He joined with them at that time?

A Yes.

Q They continued to represent you, though, is that correct?

A Yes.

Q There are basically three courses of attacking a criminal conviction and let me ask you if you know which of those have been exhausted.

First is when one is convicted, there is what is called a direct appeal.

A (Nods head affirmatively.)

Q Did you have a direct appeal in both cases to the Georgia Supreme Court?

A Yes, I believe so.

Q And it was from there by certiorari that the case was carried to the U. S. Supreme Court?

A That's my understanding, yes, sir.

Q And as I understand, what you say is both cases were affirmed except that the Cobb County case was reversed as to one count.

A Yes.

Q And that was because the death penalty was imposed in the—

A Armed robbery.

Q —armed robbery?

A Right.

Q When was that decision in the U. S. Supreme Court? Do you remember?

A '77, I think, or the first of '78—I was in Florida at the time.

Q In custody?

A Yes. Being tried—

Q Were you awaiting a trial there?

A I was being tried for murder.

Q Were you tried down there?

A Yes.

Q Were you convicted there?

A Yes.

Q What sentence was imposed there?

A Life—no. Life sentence. Twenty-five years for parole.

Q And that conviction took place while the other one was on appeal?

A Yes.

Q Following the averments by the U. S. Supreme Court of your direct appeals—did those two cases go to the Supreme Court? That is, the Cobb County case and Forsyth County case. Did they go to the Supreme Court at the same time or at separate times?

A It was my understanding they were consolidated and carried up together. I don't know for sure. That's my understanding of the way the attorneys explained it to me.

Q Then after that, were you resentenced?

A Yes.

Q Given an execution date?

A Yes. I have had—that was in '78.

Q And then what took place?

A I think we went into, back on other grounds into habeas—

Q Was that State habeas corpus case?

A I think.

Q Do you know where that was filed?

A Tattnall County.

Q Superior Court then of Tattnall County?

A Yes. Judge Harvey.

Q Did you go to a hearing on that or was—

A Yes, it was a hearing.

Q You personally attended?

A Yes.

Q And what attorneys represented you there?

A Barry Staples.

Q Same attorney you had in Cobb County?

A Yes.

Q Did the attorneys that you had representing you in the Forsyth County case also participate in that trial?

A I don't think he was there.

Q Was anyone other than Mr. Staples representing you in the habeas case?

A John Boger was there. I think he was—

Q That is Mr. Boger who is from New York?

A Yes.

Q Now, what was the result of that decision in Tattnall Superior Court?

A They didn't uphold any of the arguments.

Q Are you familiar with the various arguments, Constitutional arguments that were made at that time?

A I'm not—I know just about what they were but—

Q Did you read them when they were filed?

A Yes.

Q Have you read the two petitions for habeas corpus filed in this court by Mr. Farmer?

A Looked over them.

Q Are the arguments made here the same as the ones made in the Tattnall Superior Court or do you know or have you compared them?

A Maybe—to me, they just seem like they were different but they were the same in a way. They were just worded differently. Probably I guess it would be—I don't think they would be the same, though, the same grounds, no.

Q I will come back to that in a moment.

So as I understand it, in Tattnall Superior Court, the judge there ruled against you.

A Yes.

Q Was there an appeal from that?

A Yes.

Q And where was that appealed to?

A I don't really know. At that time, I had began to ask them to dismiss, you know, I didn't want them for my attorneys at all because before I went on to that last hearing, one of the attorneys told me, he said, "We can't win your case; all we can do is prolong it and hope that the death penalty is abolished but the trend is not going that way." He said this but my mind was already made up before he said that.

Q You mean you had made up your mind to do what you are asking to be done today?

A Yes.

Q When was this?

A About November of—well, July or August of '78.

Q '78 or '79?

A '79.

Q From the file I have reviewed, is it correct that you wrote to the Georgia Supreme Court, the Georgia Board of Pardons and Parole and the Governor in December of '79 asking that the appeal be dismissed?

A November.

Q Was it November?

A Yes.

Q Did you write again in December?

A Yes, and January.

Q Of last year? Six months ago?

A Yes.

Q Or five months ago, is that correct? Those requests took place the end of last year?

A Last year. Last November.

Q The end of last year.

Now, that appeal then was denied early this year, is that correct, after your second or third letter to the Supreme Court?

A Yes. About five months ago, six month ago.

Q Following that, then, what occurred?

A Different attorneys tried to get me to appeal and appeal and not only attorneys but other people. They didn't mean to probably but I have just been harassed. That's all. I can't—it seems like nobody wants me—I can understand human feelings and nobody wanting me to die but, you know, if I'm going to die, let me die in peace, you know, let me die that way.

Q Mr. Potts, I am anxious to make sure and I am concerned to make sure with you and to assure myself with you that you are familiar with the two habeas corpus claims filed in this court in your behalf by Mr. Farmer.

I believe I asked you a moment ago if you had read a copy of those.

A I believe it deals with double jeopardy, proving venue in the courts in the cases.

Q Did Mr. Farmer give you a copy of what he had filed or any of the lawyers with him?

A There was one brought down and I knew what was in it.

Q Did you read it?

A Looked over it.

Q The action you are requesting, do you realize would be an abandonment of certain Constitutional, claims of certain Constitutional violations? Do you understand that?

A Yes, sir.

Q And do you understand that, as I mentioned earlier, there is the direct appeal, there is the opportunity to make a State habeas corpus, a State habeas corpus attack, collateral attack upon a conviction and once that has been exhausted, one may then through the Federal courts file habeas corpus, making claims of Constitutional violations that have already been made before the State court and you can only make them in Federal court if you have exhausted State court remedies? Do you understand that?

A Yes.

Q Now, it appears that you previously have taken your direct appeal through the Georgia Supreme Court to the U. S. Supreme Court and that you had your State habeas corpus to the Tattnall Superior Court and to the Georgia Supreme Court.

A (Nods head affirmatively.)

Q And that the third and last of those forms of attack you now are in; that is, in the United States District Court claiming certain Constitutional violations. Do you understand that?

A Yes.

Q Do you understand that if you dismiss or abandon

this, you have abandoned your last available attack upon your conviction and sentence?

A I'm well aware of that.

Q The habeas corpus complaints in each instance are many pages, twenty or thirty pages long, and I do not believe it would be appropriate for me to sit here and read to you some forty or fifty pages at this time unless for some reason you indicate you have any question or are unfamiliar with what they contain.

A No, I don't have any questions. I know what they contain.

Q Do you have any question of the Court concerning this matter or the effect of your withdrawal or abandonment of this action?

A No.

Q Do I interpret your letter to me to be requesting that the lawyers, and I believe there are four by name on the complaint, Millard Farmer, Andrea Young, Joe Nursey, three of them, that they be dismissed in the case?

A Yes, please.

Q You indicated you did not wish them to represent you. Is that generally what you said in the letter?

A Nor any other lawyer.

Q You do not want any lawyer to represent you?

A No.

Q And you want both these habeas corpus cases dismissed?

A Yes, sir.

Q You realize if I dismiss those, then you have nothing from which to appeal to the Court of Appeals for the

Fifth Circuit or to the United States Supreme Court?

A Yes, sir.

Q Do you realize the consequences of that would be that you would be remanded to the State prison for resentencing by the two superior courts involved?

A Yes, sir.

THE COURT: Counsel, you have no standing, Mr. Farmer, if I grant his request but at this time, do you have anything that you think the Court has overlooked or should question the petitioner about?

MR. FARMER: Your Honor, no, sir. We only wish that what Mr. Potts wants is expressed to the Court and he has an opportunity to do so.

THE COURT: I will pursue any other subject matter of questioning to him you might deem appropriate under the circumstances if you have any suggestions.

MR. FARMER: Your Honor, only if he would, we would like to have just a short break and he would like to discuss or I could explain any matter to him. That might make us all feel better if I had an opportunity to discuss—

THE COURT: I have given him that opportunity and he indicates very strongly he does not want it.

Q (By the Court) Do you wish to consult with these attorneys at this time?

A No, sir.

Q I will give you the opportunity at this time to consult with Mr. Farmer or Mr. Nursey or Ms. Young.

A No, sir.

Q I will give you the opportunity to consult with any other attorney.

A No, sir.

Q You do not wish to?

A Not now or ever.

MR. FARMER: Or any members of his family he might wish to consult with.

Q (By the Court) Do you wish to consult with your family members at this time?

A Do any of my family members—

Q Well, I am told that your mother is present.

A We don't need to talk.

Q You have had your mother visiting with you regularly, haven't you?

A Yes, sir. Nothing needs to be said.

THE COURT: All right, do the attorneys for the State of Georgia from the Attorney General's office have any requests or further examination that I might direct to the petitioner or any comments you wish to make?

MR. KOHLER: None, Your Honor.

THE COURT: Any subject matter you believe should be pursued any further?

MR. KOHLER: No, sir.

Q (By the Court) Mr. Potts, it is my understanding that within recent months that you had an interview with a clinical psychologist and with a psychiatriast. [sic]. Is that correct?

A Psychologist from Emory and the head psychiatrist for the State of Georgia, Dr. Craig.

Q Are they the only professionals in the fields of psychiatry or psychology that you have been interviewed by?

A No. I had been to—before the—

Q I mean this year.

A Oh, yes, sir, they are the only ones.

Q The only ones since you have abandoned your appeal?

A Yes, sir.

Q Anything further you wish to say at this time?

A No, sir.

THE COURT: You may return to the table.

THE WITNESS: Thank you.

THE COURT: Does the State have anything they wish to say at this time?

MR. KOHLER: No, sir.

THE COURT: Any motions or anything else?

All right, gentlemen, you will remember then in our conference yesterday, I raised the question of whether or not there should be some professional observation other than what the Court could make of a psychiatric nature and I suggested that I would probably request someone to be present which both the attorneys for the petitioner and State agreed was a valid course, I believe, to take. Is that not correct?

MR. KOHLER: (Nods head affirmatively.)

THE COURT: I have done that and I think it would probably be appropriate if he can do so to ask him at this time to make any observations he might have concerning the competence of Mr. Potts at this time.

Dr. Davis, would you take the stand?

THE CLERK: Dr. Davis, raise your right hand.

You do solemnly swear the testimony you are about

to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

DR. DAVIS: I do.

THE CLERK: Be seated and state your full name for the record, please.

DR. DAVIS: William Simmons Davis.

THE COURT: Would you like to examine Dr. Davis or do you want me to?

MR. KOHLER: I think we would prefer for the Court to examine him, Your Honor.

WILLIAM SIMMONS DAVIS,
called as a witness by the Court, being first duly sworn, testified as follows:

EXAMINATION

BY THE COURT:

Q Dr. Davis, would you state what association, if any, or acquaintance with me, if any, you have had?

A Your Honor, I testified in your court once four or five years ago and met you for the first time today when I came down for this proceeding.

Q All right, and we have no personal association?

A We have no personal association, no.

Q All right, sir. Would you state what your educational background and professional qualifications are, please?

A Yes, sir. I was graduated from Vanderbilt University School of Medicine with the degree of Doctor of Medicine in 1956. I served a year's rotating internship at the University of Mississippi Medical Center, 1956 to

1957. I was for four years in the general practice of medicine in Jackson, Mississippi, from 1957 to 1961, at which time I left to go to the University of Western Missouri, Department of Psychiatry, where I took a residency in psychiatry, three years of specialty training in psychiatry. Upon completion of that training period, I came to Rome, Georgia, where I practiced psychiatry for eight years from 1964 to 1972. Following the year '72, I moved my practice to Atlanta where I have been since that time at 1970 Cliff Valley Way.

I am a licensed physician in the State of Georgia and the State of Mississippi and the State of Texas.

I am board certified by the American Board of Psychiatry and Neurology. I have an appointment as assistant clinical professor of psychiatry at Emory University School of Medicine.

I am on the hospital staff of Crawford Long Hospital, West Paces Ferry Hospital, Peachtree-Parkwood Hospital. I have been the vice chief of staff, chief of staff, at Peachtree-Parkwood Hospital.

I have been president of the Georgia Psychiatric Association in the past. I currently am holding an office in that association. I am a member of the Georgia Psychiatric, Southern Psychiatric, American Psychiatric Associations; the American Medical Association; Medical Association of Georgia; and the Metropolitan Atlanta Medical Association.

Q Are you acquainted in any way with Mr. Potts and/or any member of his family?

A No, sir.

Q Have you ever treated them?

A No, sir, never.

Q Are you affiliated in any way with any of the lawyers for the petitioner, Mr. Millard Farmer, Mr. Nursey or Ms. Young.

A Not any of the lawyers for the petitioner or for the State.

Q That was to be my next question.

MR. WALDEN: Your Honor, I believe there may have been some affiliation with my family.

THE COURT: All right, sir. I am totally unaware of it.

THE WITNESS: I was, too, until this minute when I —

Q (By the Court) All right, sir. To your knowledge, other than what counsel has just stated, are you aware of any affiliation with any of the attorneys for the Attorney General's office?

A None, whatsoever.

THE COURT: Is that a matter that you feel needs to be disclosed further to the Court?

MR. WALDEN: No, sir, I do not think so.

THE COURT: All right, sir.

Q (By the Court) Dr. Davis, have you been present during this entire proceeding?

A Yes, I have.

Q Will you relate first what I told you in our brief meeting before this hearing started as to what I was going to ask you to do?

A Your Honor, you asked me to determine if I could whether or not Mr. Potts was competent at the time of this hearing, that he did understand the nature of his request and that he understood the consequences of that

request if it were granted and with particular emphasis on whether or not he was competent at this time to make such a request.

Q Has the hearing been of sufficient substance and duration to aid you in any way in rendering a fair opinion concerning that subject matter?

A Yes, sir.

Q Do you have an opinion?

A Yes, sir.

Q Would you mind expressing that to the Court?

A I think Mr. Potts understands what it is that he has requested and I think he understands the nature of his request and the consequences of it.

Q Can you observe anything about Mr. Potts that would warrant or the Court's request for further, should cause the Court any concern about his competence and warrant further inquiry into that subject matter?

A No, sir.

THE COURT: All right, gentlemen, I don't know what further I can do.

Is there anything that anyone else—I have not stricken you of record in any way, Mr. Farmer, if you have some observation or comment that you wish to make.

MR. FARMER: Not in the capacity of representing Mr. Potts but in the capacity of being able to speak to the Court, Your Honor, I would like to ask that—I have been requested by Ms. Nicholson that she be allowed to visit Mr. Potts before the Court makes a determination on this decision and I would ask on behalf of immediate members of his family who have not—

THE COURT: Let me first—is there anything further

you suggest or request that might be appropriate at the present stage that we are—

MR. FARMER: Unless Mr. Potts would express something that he would want in that regard, I have nothing personally that I would request.

THE COURT: All right, how about the Attorney General's office?

MR. KOHLER: Nothing from the State, Your Honor.

THE COURT: Mr. Potts, is there anything you wish me to pursue with Dr. Davis?

MR. POTTS: No.

THE COURT: All right, Dr. Davis, thank you, sir.

You heard Mr. Farmer's request. Do you concur in that request?

MR. POTTS: There could be someone in my family I would like to speak to. Not as far as the Court's decision.

THE COURT: Do you want to talk with anybody before I rule upon your request?

MR. POTTS: I don't believe so.

MR. FARMER: Your Honor, may I ask that he be allowed the, outside the attention of the courtroom during lunch, to report back to the Court after lunch as to the decision in that matter?

THE COURT: Well, Mr. Farmer, I am willing to afford this man who is making a very serious decision reasonable requests of his in that regard. It is not the intention of the Court to thrust anything on him that he does not want.

MR. FARMER: I understand, but if he were afforded that opportunity to make the decision, if he could do—

THE COURT: I am going at this time to take a brief

recess. We will recess for fifteen minutes.

You may maintain a security on the courtroom. People may come and go and you may take Mr. Potts to the cell in the meantime but we will take a fifteen-minute recess and following that, I will take whatever action is appropriate in the case.

(Thereupon, court was recessed at 11:57 a.m.)

(Thereupon, court reconvened at 12:20 p.m.)

THE COURT: Mr. Potts, I am not going to call you back to the stand but I do want to make sure I understand one other thing that has been suggested by the attorneys and while I do not have full knowledge of everything that has been reported by the media, apparently there has been reports in the media of some destruction of religious objects of yours and some other treatment of you at Reidsville and that this had a bearing upon and was the reason you wrote the letter you wrote and are changing your mind. Is that correct, sir?

MR. POTTS: The reason I changed my mind, Your Honor, was the reason I told you in that letter.

Whatever else happened, which some things did happen and I wish that you could help make sure they don't happen anymore these last few days but that's not the reason I changed my mind. My letter is the reason I changed my mind, I told you in the letter.

THE COURT: Have you told Ms. Nicholson or other persons that the reason you were doing this was because of acts taken against you by the guards or prison officials?

MR. POTTS: No, I did not say that's the reason.

THE COURT: Also, it was called to my attention that there may be an error in the testimony; that is, that your case had in fact gone to the U. S. Supreme Court on certiorari and the attorneys in a conference during a

recess indicated that was incorrect, that the case was not actually before the U. S. Supreme Court.

Do you know if that is correct or incorrect?

MR. POTTS: It doesn't matter, Your Honor, to me.

THE COURT: Is there anything further that you wish to say to the Court, Mr. Potts, before I rule upon your request?

MR. POTTS: No, sir.

THE COURT: All right, the matter as presented the Court leaves the Court with a determination first that Mr. Potts is competent to make the decision he is making. He understands the consequences of his act, the act he is taking, the actions he is taking, that he has requested that no attorneys represent him in this matter and the Court will therefore strike Mr. Farmer, Mr. Nursey and Ms. Young as attorneys for him at his request.

The Court will, while you did not ask for such—let me make sure that is what you are asking for. The Court had granted a stay of execution on last Wednesday. You have asked that the action be dismissed and that the State be allowed to resentence you. All this Court does will be to dismiss or dissolve the stay. Is that what you are asking the Court to do?

MR. POTTS: Yes.

THE COURT: All right, that request will be granted and the stay dated January 4th staying the execution of January 5th—I mean June. I am saying January. Of June is dissolved.

That obviously requires further action by the State courts and does not address itself to this Court.

The Court in due course on your request will enter an

order dismissing each habeas corpus action which you have filed. It may be two or three days before that written order is prepared and signed and filed but the stay is dismissed as of right now. The actions will be dismissed in due course as soon as I prepare an opinion on it, written opinion on it.

Is there anything further to come before the Court?

(Thereupon, court was adjourned at 12:25 p.m.)

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, Linda Fincannon, Official Court Reporter of the United States District Court for the Northern District of Georgia, do hereby certify that the foregoing 38 pages constitute a true and correct transcript of proceedings had before the said Court in the City of Atlanta, Fulton County, Georgia, in the matter therein stated.

In testimony whereof I hereunto set my hand on this the 14th day of June 1980.

/s/ LINDA FINCANNON

Linda Fincannon,
Official Court Reporter

ORIGINAL

RECEIVED
JUL 8 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1751

WALTER D. ZANT, Warden,

Petitioner,

vs.

JACK HOWARD POTTS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

PAMELA L. J. ARANGNO
MILLARD C. FARMER
JOSEPH M. NURSEY
ANDREA I. YOUNG
15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116

FRANK DERRICKSON
RALPH GOLDBERG
THOMAS MCKEE WEST
600 Healy Building
57 Forsyth Street
Atlanta, Georgia 30303
(404) 524-1293

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	Page
Citations	ii
Question Presented	2
Statement of the Case	3
Reason for Not Granting the Writ	11
THE REMAND BY THE COURT OF APPEALS TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON THE ISSUE OF ABUSE OF 28 U.S.C. §2254 AND VOLUNTARINESS OF DISMISSAL OF PRIOR 28 U.S.C. §2254 ACTION WAS PROPER UNDER THE UNUSUAL FACTUAL CIRCUMSTANCES IN THIS CASE	11
Conclusion	12

CITATIONS

Cases	Page
Coker v. Georgia, 433 U.S. 584 (1977)	3
Johnson v. Zerbst, 304 U.S. 458 (1938)	11
Patrick v. State, 247 Ga. 168, 274 S.E. 2d 570 (1980)	3
Potts v. Austin, Case Nos. C80-964A and C80-46G (N.D. Ga. 1981)	4
Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978)	3
Potts v. Zant, 638 F. 2d 742 (5th Cir. 1981)	11, 12

Statutory Provisions	
28 U.S.C. §2254	2, 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1751

WALTER ZANT, Warden,

Petitioner,

vs.

JACK HOWARD POTTS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Respondent, Jack Howard Potts, respectfully prays that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Unit B, entered on February 17, 1981 be denied.

Petitioner adequately sets forth the citations to the opinions below and the jurisdiction of this Court in his petition.

QUESTION PRESENTED

Whether this Court should review the Circuit Court's limited and virtually interlocutory decision remanding this 28 U.S.C. §2254 case back to the District Court for an evidentiary hearing on the issue of abuse of the writ and voluntary dismissal of a prior 28 U.S.C. §2254 action.

STATEMENT OF THE CASE

Respondent, Jack Howard Potts ("Jackie Potts") was convicted of kidnapping,[1] aggravated assault and two counts of armed robbery in the Superior Court of Cobb County, Georgia on March 11, 1976, and was sentenced to death. Subsequently, he was convicted of murder in the Superior Court of Forsyth County on July 14, 1976 and was given a second death sentence. Both convictions and sentences were imposed for a single incident.

The two cases were consolidated on appeal by the Supreme Court of Georgia, which affirmed in Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978). Although Jackie Potts, an indigent, desired to file a petition for writ of certiorari in the United States Supreme Court, his attorneys failed to do so.

On November 14, 1978, Jackie Potts filed a habeas corpus petition in the Superior Court of Tattnall County, Georgia, for both of the convictions and sentences of death. On July 24, 1979, all relief was denied by the Superior Court of Tattnall County.

Application for certificate of probable cause to appeal the denial of the habeas corpus petition was filed in the Supreme Court of Georgia on August 9, 1979. Subsequently,

---

[1] The United States Court of Appeals for the Fifth Circuit incorrectly stated that Potts had been convicted of "kidnapping with bodily injury" 638 F.2d 727, 729 (5th Cir. 1981)(Appendix 4, 5). The same inaccuracy appears in the decision of the Georgia Supreme Court, Potts v. State, 241 Ga. 67, 88, 243 S.E. 2d 510 (1978). Potts was only convicted of simple kidnapping in Cobb County which is not a capital felony in Georgia. See, Coker v. Georgia, 433 U.S. 584 (1977). Patrick v. State, 247 Ga. 168, 274 S.E. 2d 570 (1980).

In the Superior Court of Cobb County, the State of Georgia attempted to use the homicide which is the basis of the Forsyth County conviction of murder as an aggravating circumstance for the kidnapping. The Cobb County jury was charged on murder as an aggravating circumstance for the kidnapping but did not find the homicide as an aggravating circumstance. The State of Georgia then crossed the Cobb County line into Forsyth and was successful in obtaining a murder conviction using the homicde earlier rejected by the Cobb County jury.

Jackie Potts discharged his attorneys and requested them to withdraw the pending applications.[2] Although counsel communicated this request to the Supreme Court of Georgia, they conveyed to that court the strong possibility that Potts was acting under duress because of certain chronic, unattended medical problems.

On January 8, 1980, the Supreme Court of Georgia granted Jackie Potts' request to discharge his attorneys, denied his motion to withdraw the applications for certifcate of probable cause, and denied the applications.

Execution dates were set in both cases for February 15, 1980. On February 13, 1980, Governor George Busbee, acting upon a request from the State of Georgia Pardon and Parole Board which was neither initiated by nor consented to by Jackie Potts, granted a ninety day stay pending clemency consideration. Jackie Potts not only did not initiate or consent to the stay granted by Governor Goerge Busbee, but in addition declined to cooperate with attorneys seeking to pursue clemency on his behalf.[3] After a proceeding on April 24, 1980 at which Potts was unrepresented, clemency was denied on May 1, 1980.

Execution dates were then set in both cases for June 5, 1980. Then Jackie Potts sought the first ever federal review of his sentences of death in a petition filed in the United States District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions, on June 4, 1980, less than sixteen hours before his scheduled execution. Potts v. Austin, Case Nos. C80-964A and C80-46G. The procedural history of his cases reflects the struggles of a tormented person to

---

[2] Potts was not represented at this time by present counsel.

[3] The attorneys seeking to assist in the clemency proceedings were not present or past attorneys of Potts. They were attorneys from a State of Georgia agency, the Georgia Indigent Defense Counsel.

reconcile his desire for life with his intense feeling of remorse for his past conduct.

Since 1975, Jackie Potts has suffered unrelenting physical pain from a bullet wound received from the .357 magnum pistol of the arresting officer. The bullet entered through his mouth and lodged in the soft tissue near his spine where it remains to this day. Jackie Potts has never received adequate medical treatment for the wounds received during his arrest. In fact, tooth fragments that lodged in Jackie Potts' tougue as a result of the bullet passing through his mouth were removed by a fellow inmate using pliers and a razor blade. These tooth fragments were lodged in Potts' tongue for over three years.

Since his conviction, Jackie Potts has been incarcerated in the Georgia State Prison at Reidsville or at the Georgia Diagnostic and Classification Center at Jackson. The Georgia State Prison is presently under court order from United States District Court Judge Anthony Alaimo. A comprehensive report prepared by the federally appointed monitor has enumerated many unconstitutional medical conditions existing at the Georgia State Prison. The Federal District Court for the Middle District of Georgia has also found unconstitutional prison conditions of incarceration at the prison in Jackson. In addition, the State of Georgia has acknowledged and admitted that unconstitutional conditions existed at both prisons.

Jackie Potts has had to struggle with his physical and psychological pain while in an environment that in and of itself produced such pain. He has endeavored to come to terms with his past conduct, and to regain some control over his life.

The paths he has taken in an attempt to give his life purpose and justification are not at all unusual. He converted to Catholicism, seeking divine forgiveness. Many of

his subsequent actions may be viewed, like this one, as an attempt to do penance.

The dismissal of his attorneys after the Georgia Supreme Court denied review of his state post-conviction proceedings may be seen as a loss of hope or a willingness to accept society's punishment. But, Jackie Potts wants to live. His faith does not allow him to pursue any other course. Thus, even while Jackie Potts was refusing to oppose the State's actions to execute him, he was reaching out for life in the fullest sense.

Jackie was determined to accept the physical pain from the police officer's bullet. When presented with a long awaited opportunity to have medical attention, his mental anguish forced him to reject any help for his own pain. Through this action he tried to compensate for whatever pain he had caused others. As the date of his execution approached, Jackie Potts willed himself to accept the punishment of death. He was determined to face death with dignity and without regret.

Yet in the early evening hours of the day before his scheduled execution, Jackie Potts succumbed to the entreaties of his brother and filed his first federal habeas corpus petition. He later explained that he did not want his brother to feel responsible for his death.

The days leading up to Jackie Potts' decision to oppose his execution were marathons of visiting with friends and family, discussions and negotiations with prison officials for medical attention, and conferences with the press.

The ultimate decision to appeal was in complete contradiction to his decision to be executed; a decision he had mentally prepared to accept. Jackie Potts was prepared to cease to fight on June 5. Instead, he found his fight had escalated far beyond what it had been previously.

In the days following his June 4, 1980, decision to receive relief from his unconstitutional sentence of death, Jackie Potts was mentally fatigued and physically exhausted. In this weakened state he was forced to endure a tremendous alteration in the state of his incarceration. He became a focal point of institutional malice; his renewed desire to live enraged those who had prepared to see him die. The presence of family and friends was immediately restricted as the prison officials limited visits to one day a week for only four hours. There was purposeful and punitive harassment caused by prison officials. The ultimate symbol of his humiliation was a haircut given a day after the stay of execution was granted in the presence of a large group of jeering prison guards. The full force of the oppressive conditions at the Georgia State Prison bore down on the fatigued Jackie Potts.

Jackie was disturbed by the circus atmosphere surrounding his case, an atmosphere that embroiled his family and friends. His mother was not pleased with his decision to fight for his life in the federal courts. His mother complained in the media of the uncertainty of Jackie's fate. She told her son that he had done the wrong thing by not going through with the execution. She felt he should not suffer on death row any longer and she sought relief from the uncertainty of his fate.

In response to his mother's wishes, Jackie sent a note delivered by his mother to Judge O'Kelley stating his intent to dismiss his appeal. Judge O'Kelley scheduled a hearing to determine Jackie Potts' competence to dismiss his petition. At that hearing, an emotionally drained Jackie Potts refused the assistance of available counsel and surrendered to his mother's wish. Judge O'Kelley used Rule 11 of

the Federal Rules of Criminal Procedure to guide his determination of whether Jackie Potts was competent to dismiss his petition for federal habeas corpus. On the witness stand, Jackie Potts answered Judge O'Kelley's questions briefly, his face impassive.

The hearing itself lasted seventy-five minutes, including a twenty-three minute recess. Not one question was asked of either Jackie Potts or the Court by the State of Georgia during the brief hearing. The State of Georgia filed no responsive pleading.

During the brief recess in the hearing, Jackie Potts made a request through the United States Marshal's office asking to speak with Judge O'Kelley in his chambers.[4] Judge O'Kelley refused this request and made no attempt to determine the reason for the request. At the end of the hearing, Judge O'Kelley dismissed the petition from the bench and filed his written order on Friday, June 13, 1980. The new execution date was set for Tuesday, July 1, 1980.

On June 25, 1980, Jackie Potts filed a second habeas corpus petition in the Federal District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions. Jackie Potts had reconfirmed his desire for life.

On June 26, 1980, Judge O'Kelley held a hearing to determine whether he would grant a stay of execution pending consideration of Jackie Potts' second habeas corpus petition. This petition was virtually identical to the petition that was dismissed on June 13, except for a comprehensive explanation for dismissing the first petition filed fourteen days earlier.

---

[4] This request for a private discussion with the Court may have been the most obvious warning that something was not understood or going wrong that could not be explained in open court. Potts was proceeding pro se at this time and the Court should have been sensitive to his layman's request for a bench conference.

Additionally, counsel for Jackie Potts stated that the dismissal of the first petition was the result of mental fatigue and duress due to physical abuse by correctional officers. Counsel attempted to present evidence to support the reasons why Potts' had dismissed his earlier petition. Two psychologists, experts in the field of prison psychology and consultants on the conditions suit against the Georgia Diagnostic and Classification Center,were in the courtroom ready to give the Court the benefit of their experienced opinions. The testimony of these psychologists would have informed the Court of the coercive, brutal, inhumane treatment by prison officials of Jackie Potts. The psychologists would have explained the psychological fatigue that resulted from Jackie Potts' years of incarceration on death row in the Georgia prisons. The Court refused to allow the presentation of any of this evidence which would have explained Jackie Potts' dismissal and refiling of his habeas corpus petitions. Instead, the only explanation of Jackie Potts' duress and mental stress was through counsel's offer of proof and the verfied petition. The court refused to allow the testimony of Jackie Potts who was present in the courtroom.

Thus, the rulings of the Court excluded testimony from the record that would have shown that any action on the part of Jackie Potts in dismissing his earlier petition was due to his psychological fatigue and the duress resulting from the continual physical and psychological abuse he received at the hands of Georgia prison guards. Potts would have also shown he did not abuse the writ.

After the dismissal of the petition by the District Court and a denial of a stay of execution, petition was granted a stay of execution on June 28, 1980, by the United

States Court of Appeals for the Fifth Circuit. On July 1, 1980, This Court rejected the Warden's application to vacate the stay granted by the Court of Appeals.

The United States Court of Appeals for the Fifth Circuit has remanded the case back to the District Court for further hearings.

REASON FOR NOT GRANTING THE WRIT

This Court should not grant review of the decision of the Court of Appeals for the following reason:

The remand by the Court of Appeals to the District Court for an evidentiary hearing on the issue of abuse of 28 U.S.C. §2254 and voluntariness of dismissal of prior 28 U.S.C. §2254 action was proper under the unusual factual circumstances in this case.

> The district court held that Potts intentionally abandoned his federal habeas corpus rights and that this rendered his subsequent petition an abuse of the writ. Despite Potts' allegations of reasons justifying his actions, and despite his proffer of evidence, the court did hold an evidentiary hearing. The narrow and important issue facing us on this appeal is whether or not the knowing and intentional waiver, pursuant to the classic definition enunciated in Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 2d 1461, of Potts' federal habeas corpus rights renders a subsequent petition an abuse of the writ, without regard to any justifiable reasons Potts may have had for initial waiver or subsequent petition. [Footnote omitted] Potts v. Zant, 638 F. 2d 742 (5th Cir. 1981).
>
> * * * * * * * *
>
> During the hearing on June 26, Potts' attorneys maintained that if the district court was prepared to reject his second petitions for being an abuse of the writ, they had a right to present evidence explaining Potts' action and rebutting the state's pleading of abuse. The district court permitted Potts' attorneys a brief offer of proof in which they quickly were to explain Potts' actions. The district court, however, refused to grant an evidentiary hearing on any issue relevant to abuse. On the basis of the evidence addressed in the 'next friends' petition and in the June 10 hearing, the district judge was convinced that Potts had made an intentional and voluntary waiver of his right to federal habeas, and

> that this meant any subsequent petition was an abuse. We conclude that the court should have granted a hearing on the issue of abuse. Our holding in this matter is divided into two parts. In the first part, we discuss the law respecting the need for an evidentiary hearing with respect to the issue of abuse even assuming Potts' abandonment was indeed knowing and voluntary. In the second part, we discuss the need for an evidentiary hearing to determine the voluntariness of Potts' abandonment. By separating the issues to be determined in an evidentiary hearing into these two contexts, we hope to clarify the district court's task on remand.
>
> Potts v. Zant, supra, at 747.

The approach taken by the Court of Appeals provides the Petitioner a full opportunity to show such abuse of the writ, if he can, at the hearing. At best, this case is not ripe for determination on the record now available. If the results reached by the District Court at the hearing are not satisfactory to the Petitioner, certainly then he can complain further with a full record, ripe for determination.

CONCLUSION

For the above reasons shown, a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Millard C. Farmer
Pamela L. J. Arangno
Joseph M. Nursey
Andrea I. Young
15 Peachtree St., N.E.
Suite 831
(404) 688-8116

Frank Derrickson
Ralph Goldberg
Thomas McKee West
600 Healy Bldg.
57 Forsyth Street
Atlanta, Georgia 30303
(404) 524-1293

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party, Mr. Arthur K. Bolton, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334, with a copy of the foregoing by placing same in the U.S. Mail in a properly addressed envelope with adequate first-class postage attached thereon.

This 7th day of July, 1981.

Millard C. Farmer

COUNSEL FOR PETITIONER

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116